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Supreme Court, U.S.
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No. 96-1469

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

HERNAN RAMIREZ,

Respondent.

DOCUMENTS A-G

LODGED IN SUPPORT OF RESPONDENT'S BRIEF

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	CR No. 94-379-HA
v.	**UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE**
HERNAN RAMIREZ,	
Defendant.	

The United States of America, by and through Kristine Olson Rogers, United States Attorney for the District of Oregon, and Assistant United States Attorney Stephen F. Peifer, submits this memorandum in opposition to defendant's motion to suppress evidence.

I. INTRODUCTION

In the pre-dawn hours of November 5, 1994, several dozen law enforcement officers converged on defendant's house in rural Boring, Oregon, to execute a federal search warrant for the person of Alan Lawrence Shelby. A federal and state fugitive, Shelby had slipped from his handcuffs and struck a deputy sheriff to escape while en route to testify on an associate's behalf in Tillamook County. Shelby had a long history of escapes, violent conduct, and criminal convictions, and had vowed that he would not serve time in a federal prison.

The U.S. Marshal obtained a warrant for Shelby's arrest and conducted an area-wide manhunt that led them to defendant's house. The marshal sought and obtained authorization from the issuing magistrate to serve the search warrant at night and to do so without compliance with the knock-and-announce requirement, based on Shelby's demonstrated dangerousness.

Special "SERT" and "SWAT" teams of state and county officers surrounded the house. From the front of the residence, Oregon State Police officers shouted their identity and purpose to the occupants via bullhorns and ordered them to come outside. Clackamas County Sheriff's officers went to the attached garage, shouted "Sheriff--Search Warrant," and broke a garage window. (The plan was to secure the garage first because officers had information that defendant kept drugs and guns there.) Defendant responded by firing at the officers from the garage, striking one in the face, causing them to return fire and force defendant from the building.

After advice and waiver of rights, defendant admitted he had fired at the officers, that he owned the gun he used as well as another one in the house, and that he was a convicted felon. ATF Special Agent George Kim used that information, along with an officer's observation of a gun inside the house, to obtain a second federal search warrant (attached as Exhibit A). It permitted agents to reenter the house later the same day to

retrieve that gun and a second one hidden in a box as defendant had described.

A thorough search of the entire premises failed to turn up the fugitive Shelby. When Kim showed defendant and his young son a picture of Shelby, they both confirmed he had been at the location a few days earlier.

II. DISCUSSION

Defendant seeks suppression of the firearms on three grounds: (1) the alleged failure of the first search warrant's affidavit to establish probable cause that Shelby was in defendant's house; (2) failure to comply with the knock-and-announce requirements of 18 U.S.C. § 3109, and (3) improper execution of the warrant in violation of the Fourth Amendment.

A. The Probable Cause Issue

The law has long recognized a preference for warranted rather than warrantless searches, and thus the magistrate's determination of probable cause is paid great deference by reviewing courts. Spinelli v. United States, 393 U.S. 410, 419 (1969); United States v. Ventresca, 380 U.S. 102, 109 (1965). Affidavits are to receive a reading based on reason and common sense, without the application of a hypertechnical standard of review.

> . . . [T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants must be tested and interpreted in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst

> and haste of criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no place in this area. A grudging or negative attitude toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

Id., 380 U.S. at 108.

According to Illinois v. Gates, 402 U.S. 213, 236 (1983), after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis" for the probable cause finding. Id. (quoting Jones v. United States, 362 U.S. 257, 271 (1960)); United States v. Di Cesare, 766 F.2d 890, 896 (9th Cir. 1985). Probable cause does not demand a showing that the belief be correct or more likely true than false. United States v. Murray, 751 F.2d 1528, 1532 (9th Cir. 1985). A practical, non-technical probability that contraband or other criminal evidence (or, in this case, the fugitive Shelby) will be found in a particular place is all that is required. Texas v. Brown, 460 U.S. 730 (1983); United States v. Seybold, 726 F.2d 502, 503-504 (9th Cir. 1984).

Under these standards, the search warrant affidavit contained more than adequate probable cause to believe Alan Lawrence Shelby was present in defendant's property, including inside his house, on November 5. A confidential, reliable informant told SA Kim that he had seen a man named "Alan" at the residence who made the approximate statement, "I had to knock out

a guard." The informant made the connection between "Alan" and Shelby when he read an article about the escape. Kim already considered the informant reliable based on earlier correct information he had provided, including facts that had led to the arrest of another fugitive felon.

Kim drove the informant near the house, and they saw a man they believed to be Shelby washing a car outside defendant's house. Kim found the man to be "very similar" to a photograph of Shelby, and the informant said he was the same man he had previously seen at the residence (who was named "Alan" and said, in effect, he had had to "knock out a guard"). Kim was close enough to see what "Alan" was wearing and that he was "clean cut."

Deputy U.S. Marshal Wayne Kauffmann, the affiant for the search warrant, drove by the residence as well. In addition to viewing the house and numerous outbuildings on the 10-acre parcel, Kauffmann saw a man resembling "Alan" come out of the house, but because of the distance he could not make a positive identification. Like Kim, however, Kauffmann was close enough to make out the man's clothing and "clean cut" appearance.

Viewed in a common-sense and realistic fashion under the totality of the circumstances, the affidavit established a "substantial basis" for the magistrate to find that Alan Lawrence Shelby probably would be found in defendant's house. The reliable informant's first-hand information about "Alan," who said, in effect, that he had knocked out a guard, coupled with

the corroborative observations of Kim and Kauffmann, persuasively established Shelby's presence at the location shortly before the warrant issued. The magistrate reasonably inferred from the facts that Shelby likely was staying there, so he would be found in the residence itself.

Defendant's argument against probable cause is the same timeworn, hypertechnical approach to search warrant analysis that federal courts have uniformly rejected. To posit, as defendant does, that the remark about having to "knock out a guard" might refer to playing touch football is directly contrary to the requirement that affidavits be interpreted in a commonsense and realistic fashion. The same is true of his criticisms of the affidavit for not listing "Alan's" identifying characteristics and not establishing his identity with a higher degree of certainty. Probable cause does not demand certainty or correctness, only a "substantial basis for belief." That standard was more than adequately met here, and this court should not disturb the magistrate's finding.

The evidence, however, is admissible irrespective of whether probable cause supported the warrant. Under the "good faith" rule of United States v. Leon, 468 U.S. 897 (1984), and Massachusetts v. Sheppard, 468 U.S. 981 (1984), the Fourth Amendment exclusionary rule is inapplicable when officers have acted in reasonable reliance on a judicially issued warrant. There are only four circumstances under which the good faith exception does not apply, and none of those circumstances is

present here: (1) if the warrant is based on a "bare bones" affidavit "so lacking in evidence of probable cause as to render official belief in its existence entirely unreasonable"; (2) if the warrant is based upon deliberate or reckless material misrepresentations by the affiant; (3) if the issuing magistrate has wholly abandoned the required neutral and detached judicial role; or (4) if the warrant's particularization of the place to be searched or the items to be seized is "so facially deficient . . . that the executing officers cannot reasonably presume it to be valid." Leon, 468 U.S. at 923; see United States v. Michaelian, 803 F.2d 1043, 1046 (9th Cir. 1986). Defendant has not alleged, and cannot prove, any of these factors.

B. The Knock-and-Announce Issue

Officers serving a search warrant at a house ordinarily must announce the authority under which they are acting and the purpose of the call. If they are refused admittance to the premises after the announcement, they may enter forcibly. 18 U.S.C. § 3109; United States v. Woodring, 444 F.2d 749 (9th Cir. 1971). Courts relax these requirements, however, when exigent circumstances make observance of the statute inappropriate. See United States v. Turner, 926 F.2d 883, 886-87 (9th Cir.) cert. denied, 502 U.S. 830 (1991). Here the officers announced their identity and purpose but, for safety reasons, broke the garage window before waiting for the occupants to respond.

The most recent case on the subject in the Ninth Circuit is United States v. Becker, 23 F.3d 1537, 1541 (9th Cir. 1994), where the court held that "mere unspecific fears" about peril to officers does not justify relaxation of the rule. Becker discussed a two-tiered approach to exigency. Citing United States v. McConney, 728 F.2d 1195, 1206 (9th Cir. 1984) (en banc), the court stated that "even mild exigency, like knowledge that a person is dangerous, can justify immediate entry where that can be done without any physical destruction of property." Becker, 23 F.3d at 1540. See also United States v. Arias, 923 F.2d 1387, 1391 (9th Cir. 1991). To justify physical destruction of property (as occurred here), "[m]ore specific inferences of exigency are necessary." Becker, 23 F.3d at 1541 (quoting McConney, 728 F.2d at 1206).

Ninth Circuit decisions have demonstrated the types of circumstances that do not justify forced entry. In United States v. Mendonsa, 989 F.2d 366, 370-71 (9th Cir. 1993), there was insufficient exigency based merely on the occupant's prior armed robbery conviction, a little noise inside the house, and the "inherently dangerous job of arresting drug dealers." Officers in United States v. Moreno, 701 F.2d 815, 817-18 (9th Cir. 1983), vacated on other grounds, 469 U.S. 913 (1984), feared destruction of evidence just because there was "always" a danger in drug cases. That was not an adequate reason for forced entry, the court held. Although officers in United States v. Fluker, 543 F.2d 709, 717 (9th Cir. 1976), believed an occupant owned a gun

and there was a general fear that narcotics might be destroyed, there was insufficient exigency. Finally, in Becker, there was no exigency based on a generalized fear that the homeowner might be dangerous and that a methamphetamine laboratory might be on the premises.

The highly specific facts indicating dangerousness in the present case stand in sharp contrast to the "generalized fears" outlined in the above decisions. As set forth in detail in the search warrant affidavit, fugitive Alan Lawrence Shelby had a history of escapes and assaultive behavior. A few days earlier, he had escaped from a deputy sheriff by slipping out of handcuffs, striking the deputy and knocking him down. Shelby was serving long federal sentences for manufacturing methamphetamine and use of a firearm during a crime, concurrently with a state sentence for armed robbery at the Oregon State Penitentiary. Shelby had accurately predicated he would escape from a transport van if given the opportunity and vowed "not [to] do federal time."

In 1991 Shelby struck a corrections officer in the face and kicked out a jail door. While fleeing the jail, he assaulted a woman, stole her vehicle, and then rammed a police vehicle. While awaiting trial on narcotics and weapons charges in Eugene, Shelby attempted a jailbreak by constructing a rope from torn bed sheets and breaking a window.

He had threatened to kill witnesses and police officers associated with his incarceration. Also, Shelby had used a

hammer to brutally torture people. A major methamphetamine manufacturer, he had access to large caches of weapons. Although not detailed in the affidavit, the officers also knew Shelby's long criminal record included several convictions for armed robbery.

For these specific and detailed reasons, the officers considered Shelby to be an extreme danger to their safety. There was every reason to believe he would not submit peaceably to their authority but would, as usual, react violently. "Armed and dangerous" seriously understates his status and the peril faced by law enforcement officers in recapturing him. Also, the officers had information that defendant sold drugs and kept drugs and guns in the garage, which his later violent reaction confirmed. The officers thus had a highly persuasive basis for non-compliance with the knock-and-announce rule.

In addition to his argument under 18 U.S.C. § 3109, defendant contends the officer's actions were unreasonable under the Fourth Amendment. There is no authority for the proposition that the federal constitution provides broader protection or a stricter knock-and-announce rule than that of § 3109. In fact, the law may be the reverse. See Ker v. California, 374 U.S. 23, 38-41 (1963) (reasonableness standard of Fourth Amendment, rather than the federal statute, governs how state officers enter a suspect's home); United States v. Bustamante-Gamez, 488 F.2d 4, 9 (9th Cir. 1973) ("to some extent," the requirements of § 3109 "have been incorporated into the Fourth Amendment"), cert.

denied, 416 U.S. 970 (1974). At any rate, the same demonstrated exigencies that sufficed to excuse § 3109 compliance also met the Fourth Amendment reasonableness test.

Finally, the magistrate-judge's endorsement of a "no-knock" clause in the warrant, while not explicitly authorized by statute, in no way illegitimized the officers' conduct. If anything, the endorsement manifested their good faith in submitting the matter to judicial analysis prior to the warrant's execution. It certainly did not affect the legality and constitutionally of the entry, which passes muster under the objective exigency test as discussed above.

C. Inapplicability of the Exclusionary Rule

The government's primary position is that the search warrant was a lawful one based on probable cause and that a specific showing of exigency excused compliance with the knock-and-announce rule. Even assuming, arguendo, that either of these positions is incorrect, it does not follow that the court must exclude evidence of the two firearms forming the basis for defendant's indictment. Rather, defendant's intervening act of shooting from his house renders the exclusionary rule inapplicable to the firearms since they were not "fruit of the poisonous tree."

Wong Sun v. United States, 371 U.S. 471, 487-88 (1963), the seminal case in the field, described the limitations of the exclusionary rule:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made was come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

There is a body of law holding that, when a person subjected to an allegedly illegal search or arrest responds with force against the officers, resulting evidence is not fruit of the poisonous tree. See 4 La Fave, Search and Seizure: A Treatise on the Fourth Amendment § 11.4(j) (2d ed. 1987 and 1994 Supp.). Here, the discovery and ultimate seizure of the firearms (under a second search warrant) resulted from defendant's use of force against the officers, not from any exploitation of what defendant asserts was illegal activity.

Several federal cases illustrate this point. In United States v. King, 724 F.2d 253 (1st Cir. 1984), the court assumed, without deciding, that the officers committed some illegality in attempting to search defendant, but he responded by shooting at them. "We believe the shooting was an independent intervening act which purged the taint of the prior illegality," the court stated. Id., 724 F.2d at 256. King cited favorably United States v. Bailey, 691 F.2d 1009 (11th Cir. 1982), cert. denied, 461 U.S. 933 (1983), and United States v. Nooks, 446 F.2d 1283 (5th Cir.), cert. denied, 404 U.S. 945 (1971), where the courts admitted evidence discovered when an illegal stop was interrupted by a defendant's flight. "In each case the search was in

progress when flight occurred. In each case the court held that the flight constituted an intervening act which provided probable cause for the ultimate search." King, 724 F.2d at 256.

United States v. Waupekenay, 973 F.2d 1533 (10th Cir. 1992), reached the same result for a different reason. Defendant in that case pointed a gun at the police after they had illegally entered his premises. The court held:

> We conclude that Mr. Waupekenay did not have a legitimate reasonable expectation of privacy when he initiated criminal activity--assault--in the presence of the police officers within the trailer. Once Mr. Waupekenay was aware that the police officers were present in his home and were observing him, he could not have had a reasonable expectation of privacy for any actions initiated subseguently to that time in their presence. He obviously intended for the police to see him aim a semi-automatic weapon at them. Thus he could not have had a legitimate expectation of privacy in that action [citation omitted].
>
> * * * *
>
> Our decision is consistent with the holding of many other courts, state and federal, that have considered situations in which a defendant seeks to suppress evidence relating to his or her violence or threatened violence toward police officers subsequent to an unlawful search or seizure or a warrantless entry. In assault, resisting arrest, disorderly conduct, and weapons related trials, these courts have uniformly rejected motions to suppress arising from skirmishes comparable to the one at issue in the instant case . . . . [citations omitted].

Id., 973 F.2d at 1537. In addition to King and Nooks, the court in Waupekenay cited 13 other state and federal cases supporting its holding in similar contexts.

Among the many state court opinions on this issue, State v. Villarreal, 152 Ill. 2d 368, 178 Ill. Dec. 400, 604 N.E. 2d 923

(1992), deserves mention. The Illinois Supreme Court held that defendants were precluded from resisting police officers' attempt to enter a house to arrest a third party, regardless of whether the police actions would have been legal. The exclusionary rule cannot be applied to suppress actions directed against the police, even when the police illegally enter a defendant's home to arrest another person, the court held. Id., 604 N.E. 2d at 927.

Here, defendant responded to the officers by shooting at them from his home. His intervening action created an independent basis for what followed, namely, his removal from the house, his questioning (with admissions of gun ownership and felon status), and seizure of the firearms pursuant to a second search warrant. Even if there were arguable illegality in the initial police conduct, all the intervening events occasioned by defendant's armed resistance (including the seizure of the guns) are not subject to the exclusionary rule.

III. Conclusion

For the above reasons, the court should deny defendant's motion to suppress.

DATED this 22nd day of February, 1995.

Respectfully submitted,

KRISTINE OLSON ROGERS
United States Attorney

STEPHEN F. PEIFER
Assistant United States Attorney

(B)

JUN 13 1995

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Cr. No. 94-379-HA
versus	)	April 25, 1995
	)	
HERNAN RAMIREZ,	)	Portland, Oregon
	)	
Defendant.	)	

Transcript of Motion to Suppress

BEFORE: THE HONORABLE ANCER L. HAGGERTY, UNITED STATES DISTRICT COURT JUDGE

APPEARANCES OF COUNSEL

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April 25, 1995

PROCEEDINGS

MR. PEIFER: Good morning, Your Honor. This is United States versus Hernan Ramirez, Cr. 94-379-HA. Defendant is now present before the Court with counsel, Michael Levine.

Your Honor, this is the time set for a hearing on defendant's motion to suppress. The parties have submitted a stipulation of facts regarding the knock-and-announce issue, both the statutory and constitutional aspects of it. We thought it would be better to do that than to present lengthy testimony, considering the number of people involved and the amount of time it would take for the Court.

THE COURT: I've read the parties' stipulation of facts. I've read the motion to suppress with the accompanying memorandum in support, as well as the United States' memorandum in opposition to the motion to suppress. And I believe I have the reply from Mr. Levine, as well, and I've read through those.

And I believe the Court understands the issue as whether, by the officer's breaking of the window, the destruction of property, is that a sufficient basis to then say that the government has not complied with the

knock and announce?

MR. LEVINE: Partially, Your Honor. Not quite. Going to that, the manner of execution -- let me just back up for a moment and state, as the Court is aware, there are really two motions before the Court, in a sense. One is that there is insufficient --

THE COURT: Probable cause for Mr. Shelby.

MR. LEVINE: Probable cause to enter to pursue Mr. Shelby. And then the second issue, which the Court -- let's focus on that since the Court has inquired on that.

The breaking and the entering being simultaneous, if you will, with the announcement -- that's the stipulation in essence -- that, under United States versus Becker -- there's no question that that on its face does not comply with a knock-and-announce statute.

What that does, now, is require the government to show exigent circumstances. And with the break -- it's kind of a shifting line, according to the law, at least as I read it. When there's a breaking of property or a destruction of property, as there was in this case, the Court says there has to be a higher -- a more specific detailed accounting of exigent circumstances.

I might just point out Becker, I think, is the most recent case, and the leading case now in the circuit. But it points out that the mere incantation by

the government of the phrase "exigent circumstances" -- and I'm quoting here, "does not dissolve -- does not dissolve the shield that our law provides."

I mean, there's always some degree of exigency any time law enforcement officers are looking for anybody. That can't justify the breaking and entering into a home.

So the question is, in this specific case is the specific articulation of exigency in this particular case sufficient, as a matter of law, to justify a -- what amounts to a wholesale breaking and entering into the property and particularly into the garage, which is where the -- which is part of the property? It's an attached garage.

For the Court's convenience, I've simply blown up, with the government's permission -- we've blown up the diagram, the exhibit. It's identical. But the entry occurs here at the garage window. But this is a standard attached garage to many residences, a door here into the garage. So, for all intents and purposes, this is the residence.

I think that -- I think, clearly, this was inappropriate. We have here a Saturday morning in the early morning hours, when agents know or must know, have to know, that the residents will be asleep. We have a husband

and wife and a three-year-old child asleep in the master bedroom. And we have what ensues, exactly what one would expect to ensue when agents don't comply with the law. We have what almost was a true tragedy.

But I think it was best expressed by Sam Irvine in my motion. I quoted from Sam Irvine when he was talking about why the Congress abolished the no knock. The agents talk about exigent circumstances and fear for their safety as justifying a breaking with a simultaneous announcement. That's what they claim in this case.

But what does Sam Irvine say? "I know of no provision of law which puts officers of the law in more jeopardy of life and limb than a provision which undertakes to authorize no-knock searches of the homes of our citizens. When someone" -- and this is the key statement. "When someone attempts to" -- and I'm quoting now from my motion at page 12. "When someone attempts to break into the dwelling house of the average citizen in the night time, the average citizen is not going to wait to ascertain whether it is an officer of the law or whether it's a burglar. He is going to resist to the utmost, even to the taking of lives, the unwarranted intrusion into his house by someone who attempts to enter without notice, without identifying himself, without revealing his status as an officer of the law, and who attempts to enter by force like

common burglars. It is ridiculous to say that breaking in without notice serves as a protection for the police officer. The contrary is true."

Now, the courts have held that -- while this statement refers specifically to breaking without any notice, the courts have essentially held -- at least Becker and Mendonza and the other cases -- that simultaneous entry and announcement is the same evil. There's no difference, because it's -- if a home owner hears breaking and someone shouting, it's impossible to make out, as it was in this case, what exactly is being shouted, particularly at 6 o'clock in the morning on a Saturday morning.

Your reaction is -- if anyone's ever listened to bullhorns or tried to listen to bullhorns, they're virtually unintelligible most of the time. Even in the stipulated facts, one of the officers, who's right by the garage, he couldn't hear the bullhorning that was going on in the front. And the stipulation -- on the stipulation of facts, this is all happening simultaneously, the bullhorning in front, the officers shouting as they're breaking the garage window, "Search war ınt, search warrant."

The point is you should do this in advance unless -- unless the government can establish and prove that circumstances were such -- they were of such an

emergency nature, of such an exigent circumstances that the agent should not have to announce at all; they can simply break in, if you will, or break in and simultaneously announce. No doubt there are circumstances like that, but this case does not rise to that.

Now, the government says, "We have information that Shelby is an escape risk." And we don't dispute that. "We have information that Shelby knocked out a guard." And we don't dispute that. We've stipulated to that. "We have information that he has said he did not want to do federal time." We've stipulated to that.

Still, when you take all that together, that does not mean that 40 or 50 agents have to break into a residence to arrest Mr. Shelby. If anything, if he is as dangerous and -- if he is as dangerous as they claim, it's the exact opposite. They're inviting themselves to be shot to death, it seems to me, by doing that.

And I don't want to -- I'm not second-guessing how police operate. But we have only to look at recent traumatic events all over the country, Your Honor, where there's been an excess, I'm sorry to say, of inappropriate entering by police officers, these task force -- inappropriate, causing terrible destruction. And the problem can be avoided by simply following knock-and-announce principles.

We have no information that Shelby has ever shot at a federal -- has ever shot at any police officer, much less at a federal police officer. Nothing, not a shred of evidence to that effect. No information that Shelby had a weapon with him, no information that Shelby, for that matter -- that's the first part of my -- first part of my motion, that -- was spending the night in the residence.

Now, in Mendonza, in Becker they looked to the fact that the evidence -- that the person they sought wasn't in the residence or the evidence they sought wasn't in the residence as sort of a vindication of the fact that there was no exigent circumstances. And I'm going to do that, too. Shelby wasn't in the residence.

Now, in one sense that's irrelevant, because you're looking at the state of the mind before. But it also corroborates the fact that officers are wrong. They're wrong. And we have -- with respect to drugs, we have an informant and firearms. We have an informant saying, "There's supposed," -- and that's the word in the stipulation, "There's supposed to be firearms in the garage." That -- that is not, to me, a statement that ought to provide the Court with a sense of there are firearms in the garage which justify exigent circumstances, and there might be drugs. I forget the exact -- "There

possibly are drugs in the garage," and there were supposed to be firearms. That is not a exigent -- that does not give rise to exigent circumstances.

The proper thing for the police to have done in this case would have been surround the residence. We had plenty of officers, plenty of fire power, as we can see by the fuselage (sic) that was -- that Mr. Ramirez was met with. Surround the residence, announce on the bullhorn simply, as they did, but wait and have the residents have a chance to get out of bed and answer the door, find out what is happening, and come out with their hands up.

THE COURT: Okay. Even assuming everything you say is correct up to this point --

MR. LEVINE: Yes.

THE COURT: -- the stipulation does not, as I see it, take away the good faith belief that the officers thought they were executing a valid warrant, under Leon. So if you look at that as an issue, there was nothing seized as part of this initial entry. Nothing was seized. The gun was left there. They did, in fact, get one statement from Mr. Ramirez to the fact that he had the gun and that he was a prior felon.

MR. LEVINE: Yes.

THE COURT: They then come back, apply for, and receive additional search warrants.

MR. LEVINE: Yes.

THE COURT: Go back and actually seize the gun that you're seeking to suppress.

MR. LEVINE: Yes.

THE COURT: That's all you're seeking to suppress, is that gun.

MR. LEVINE: That's right, the firearm.

THE COURT: So if the officers in good faith were executing a valid warrant for Mr. Shelby, how do you then conclude that the subsequent seizure of the gun was unreasonable?

MR. LEVINE: All right. There are two parts to your argument. First of all, with respect to good faith, there's nothing in the stipulation respecting the officers' state of mind. There's no -- there's no concession in here, and I don't think there's any fact -- I -- there's certainly nothing in here wherein the defense concedes the good faith, and there's nothing in here respecting officers' state of mind.

The only thing that's in here is what the officers learned or heard or was told to them. That's a separate inquiry. There's nothing in the stipulation that goes to good faith.

Second, if there -- good faith. Even if the Court were to find good faith, and the Court can't find it

from this stipulation, there's just no facts in that regard, from my judgment.

THE COURT: But there was a warrant that was issued by the Court.

MR. LEVINE: Yes. But the burden -- the burden of proving good faith is a burden on the government, according to the United States versus McKelly. The Court will have to take -- the Court will have -- if the government wants to proceed with a good faith argument, which it did in its motion, I believe that the -- we'll have to take evidence on that.

We may have -- unless Mr. Peifer has another suggestion. I don't -- it was not covered -- certainly is not covered in this stipulation. The law of good faith is discussed in the motions.

But, moving to the law, it's my position that the good faith -- good -- one of the exceptions in Leon to the good faith principle is where the affidavit lacks the indicia -- is lacking the indicia, even minimal indicia, of probable cause.

And I have submitted, for the same reasons that I've just argued, that there's simply no probable cause, even the indicia of probable cause, to believe that Mr. Shelby was spending the night in this residence on November 4th and 5th, midnight being -- bringing it over to

the 5th. There was no probable cause that Mr. Shelby was in this residence, which brings me to the first motion.

What is the probable cause to believe that Shelby is actually in this residence on the night of November the 5th? What do they have? They have the day -- on November the 3rd, an informant calls up the marshals and says, "I was introduced to a man named Allen." Okay. "And I overheard approximately -- this Allen say approximately, 'I had to knock out a guard.'"

That's their evidence of probable cause, that Allen Shelby, the escaped fugitive, who said that on Thursday, is now sleeping in this house on Friday.

Now, of course, they have more. The agent comes up, Agent Kim, comes up the next day, November the 4th. And they look from away, a thousand yards away, apparently -- apparently. They don't say. There's nothing in the stipulation -- whether it's through binoculars or not.

But they look, and they see someone who's very similar, they say, to -- very similar to the picture of Allen Shelby, washing a car. Washing a car. It's not exactly in front of the residence. We don't know exactly where. Washing a car. I'm sorry. I think it's by the shop area is where they see him washing a car right here by E.

Now, when -- where does one make the leap of logic that if someone is washing a car during the day, that he is, therefore, spending the night in the home owner's residence? That defies common sense. It defies logic. There are all kinds of people that wash cars. There are guests, there are friends, there are people. This is a shop area. What is the evidence that he's in the residence? None. That he's spending the night in this residence? None.

If we allow the officers to make that -- to make that leap, then anybody's house is subject to search because someone was seen outside washing a car.

Now, I believe at one point somewhere in the affidavit there's a statement that Shelby was seen walking out -- to be fair, walking out the front door of the house. But that's during the day. People go into a house to get water, to work. All kinds of workmen do that all the time. Even assuming this is Mr. Shelby, assuming this is certainly Mr. Shelby, I would argue there's no probable cause to believe that he's spending the night.

The agents have to do a little more work, it seems to me, before they could go to a magistrate and say, "We've seen Shelby out here. He's sleeping in the residence."

And with respect to whether it is Shelby,

even, we have a statement that he looks very similar to the picture. Well, why does very similar-looking to a picture mean that that's probably him, particularly when you look at what isn't in the affidavit?

We know the description of Mr. Shelby. We know the specific, detailed physical description of Mr. Shelby. It's right in the affidavit. It's right on the warrant. He's 5 foot 9, he's got blond hair, he's got blue eyes. Is there any statement in the affidavit that the man they saw was 5 foot 9, blond hair, blue eyes? No.

Now, how do you normally describe people? That's the first thing you do, is give a physical description. And, as I argue in my motion, Your Honor, agents properly draft affidavits to bring the strongest light -- to put the evidence in the strongest light to the magistrate. That's understandable. They want to persuade a magistrate that there's probable cause. They are going to put in every shred of evidence that will persuade this magistrate that this is the man.

The fact that they didn't put in the description, I submit, is an inference you should draw against the government that the person they saw did not fit the description of Allen Shelby. He was not 5 foot 9. Because, Your Honor, if they put in, "We saw a man who was

6 foot 6," the magistrate's going to go, "Well, this isn't Allen Shelby." So they didn't put that in.

It's very -- it's easy to say -- and people look alike, very similar. What does that mean? But without the physical description, it seems to me that their case for probable cause to believe that Allen Shelby was on the residence -- was at this residence is deeply undermined.

But there's more. They make a -- they make a point in the affidavit twice, saying, "Mr. Allen Shelby was clean cut." The person they saw -- the person they saw was clean cut and was wearing blue overalls or a blue jumpsuit -- a blue jumpsuit. That's the person they saw.

But the description of Allen Shelby, when last seen, says nothing about his being clean cut, says nothing about his wearing a blue jumpsuit or overalls. The only description was the 5 foot 9, blue eyes, blond hair, which they repeated, and there's nothing about that with respect to the individual here.

So, Your Honor, I don't think the good faith argument can succeed on two grounds. I don't think there's a good faith belief that the person is Allen Shelby, number one. But even if he is, even you can say there's a good faith belief that that person was Allen Shelby, there's no good faith belief that that Allen Shelby was spending the

night, November the 5th, in this residence, not a shred of evidence. And it's not fairly inferable from any of the evidence.

And it is true that the agents got the -- a second warrant, but that's exactly what happened in Becker. In Becker there was an original warrant that was issued, and then the agents went and retrieved a second warrant based on what they saw. So the fact that there are two warrants is really immaterial.

The question is, is what's going into the second warrant a fruit of an illegal first warrant, either an illegal first warrant that's been issued or an illegal first warrant that's been executed? I've argued that it's illegal for both reasons independently. But if the Court finds that, of course, either that the issuance of the first warrant was unlawful or that the execution of the first warrant was unlawful, then the fruits of that warrant are suppressible and cannot be used as facts to provide probable cause for issuance of the second warrant.

Now, the government made some -- made an argument that, while the shooting -- they admit that the shooting came in response to the first warrant. But then they say, once the -- once Mr. Ramirez shot, that that provided -- that that was an intervening -- an intervening act, which in itself provides -- if I understand the

argument, provides probable cause.

Well, the cases they cite don't stand for that. They do cite various cases where there are intervening acts, but none of those cases stand for the proposition that where a home owner, in defense of his wife and his child, shoots what he perceives to be a marauding band breaking into his home, that that justifies the marauding band to later get a second warrant based on the gun shot. That would defeat the whole purpose of the Fourth Amendment, it seems to me.

The agents can't say, "Well, look what happened," and use that as grounds for going and getting a warrant. They created, if you will, their own exigency.

And I'd be happy to answer any other questions the Court has.

THE COURT: Let's hear from Mr. Peifer.

MR. PEIFER: Yes, Your Honor. First, on the issue of probable cause, the Court has to look at the affidavit from a common sense, nontechnical standpoint, giving deference to the magistrate in this case, Judge Ashmanskas, who had the opportunity to review it and draw reasonable inferences from it. And the standard is a substantial basis to believe that Mr. Shelby was there, not proof beyond a reasonable doubt, not something that we would argue to a jury.

There was ample support for probable cause in this case. Mr. Levine sort of brushes aside the fact that this confidential, reliable informant stated that someone by the name of Allen stated in his presence, while on Mr. Ramirez's property, that he had to knock out a guard. It isn't just the identification of the -- the visible identification of Mr. Shelby. It's the fact that he identified himself as Allen and said he had to knock out a guard, which is the -- one of the most -- the operative point involved in his -- his escape from custody just a few days before that.

The informant and Agent Kim saw a man that they identified as Mr. Shelby from a distance, that they said -- according to the affidavit, they believed it was Mr. Shelby, and they said it was very similar to what they knew Mr. Shelby to look like. Also, Deputy U.S. Marshal Kaufman, from a distance, drove by and saw a man resembling Shelby come out of the house -- come out of the house.

So we have the issue, first, of whether it' is Mr. Shelby. And I would submit to the Court there's very strong evidence to believe that it was Mr. Shelby, primarily based upon his own statements as well as the identification by the agent and the confidential, reliable informant.

And, secondly, would he be there at the

premises? Now, we have somebody who's there once before when the informant was in his presence, heard him speak, and then he's still there when the agent drives by with the informant, and he's still there when the Deputy U.S. Marshal drives by. So we have a period of time by which the Court could infer that it wasn't just a quick in-and-out visit. It was somebody who was there at the premises for a period of time.

On the good faith exception -- and the Court doesn't have to reach the good faith exception if you find probable cause. And I would submit that there's strong evidence of probable cause here. But if you do need to reach the good faith issue, all four of the elements of the burden that the government has to prove have been met here, to exclude the exceptions to the good faith exception.

First of all, this was not a bare bones affidavit. The Court, I think, knows, from years of experience, what a bare bones affidavit would look like, and this simply isn't one. It has a substantial basis to believe Shelby was there. There are no misrepresentations in this affidavit. If there had been misrepresentations, Mr. Ramirez could have filed his motion to contradict the affidavit. There's been no claim that the confidential, reliable informant should not be believed, and there's been no evidence and no claim made by anybody that anything in

the affidavit is not worthy of belief.

Secondly, there's no violation of the requirement for a neutral and detached magistrate. I think Mr. Levine is stretching it when he says that the government has to present live testimony by which the Court has to conclude that these elements are not present here. There's no -- there's absolutely no evidence on the face of this affidavit and the warrant to conclude that there was a violation of a neutral and detached magistrate requirement.

And, fourth, the particularization requirement was met. All you have to do is look at it to see that it's very well described.

Now, the issue of knock and announce. Mr. Levine says that this is a situation where the officers created their own exigency, and that's really a fiction in this case. They didn't create the presence of Mr. Shelby. They didn't create Mr. Shelby's long history of violence, his history of escape, his history of armed robbery, weapons possession, all the things that I'll itemize in a moment. They didn't create those things. They didn't create the information that, as it turned out, there was a firearm in that garage, because it was fired by Mr. Ramirez. They didn't create that out of whole cloth. And they certainly didn't create their exigency by breaking that window simultaneously with their announcement that --

the exigency preexisted the entry by the officers.

The Becker case is very useful for the Court, not only in stating the standard, which in this case must be specific inferences of exigency to justify the breaking, but Becker's also useful to show you what isn't good enough to show specific inferences of exigency, because it not only discusses its own facts in Becker but other cases. And, by and large, those cases have to do with just a generalized fear that, because of the nature of a person's criminal activity, because they happen to be involved in drugs, or they happen to have been convicted of something in the past, that alone without any specific itemization of what it is, does not rise to the level of exigency for purposes of knock and -- of noncompliance with knock and announce.

Now, here we had very specific information regarding Mr. Shelby. In 1991 he struck a corrections officer in the face. He kicked out a jail door. He assaulted a woman while escaping. He stole her car, and he rammed a police vehicle. That was in '91.

In 1992, when he was being held for the federal drug charge in Eugene awaiting trial, he attempted a jail break with a broken window and rope being made from some bed sheets.

In 1994, which is the incident which led to

his being a fugitive in this particular case, he struck a Deputy Sheriff while he was en route to testify in Tillamook County, Oregon. He was able to slip out of his handcuffs, struck the deputy, and fled. So there we have three documented cases of violent escape or attempted escape by force involving this Mr. Shelby.

It's undisputed that he said he would not do federal time. Here we have a person -- not only does he have a long history of escapes, but he's made it very clear that he's not going to federal prison.

The affidavit also says that he threatened to kill witnesses and police officers associated with his incarceration, again, consistent with his nature and his track record. He had used a hammer to torture people. He was a major methamphetamine manufacturer, and he'd been convicted of using a firearm in connection with that federal drug conviction.

He also -- and the Court would expect this, but there's specific reference here -- he had access, through his methamphetamine connections, to a large number of weapons. He owed a great deal of prison time on the state and federal level. He owed 240 months on his federal conviction out of Eugene. So there's a great incentive on his part to follow through on his threat that he would not do federal time.

And we also have the information from the confidential informant who said, according to the affidavit, that there was possible possession of drugs and firearms in the garage. This explains why the officers did what they did.

Mr. Levine would have the Court believe that this was just stupid on the officers' part to do this, but actually it was a very well-reasoned, well-planned, intelligent approach. Because if Mr. Shelby is there, the last thing they want to do is comply to the letter with knock and announce, knock on the door, wait awhile before they actually enter, because that would have given Mr. Shelby, or anybody else in the premises, time to react.

What they did was they went to that garage window and broke it out simultaneously with the announcement, in order to make sure that they were covered, where they expected to find guns in the house. And that's exactly what happened, because Mr. Ramirez fired off two rounds from his gun as a result of that entry.

So that was a very reasonable approach on the officers' part, and I think they would have been derelict if they'd done it any other way. They would have been derelict if they'd gone in and just broken down the door, because that would have created an even worse exigency in terms of the situation, and they would have

been even more derelict if they had -- as Mr. Levine says, if they'd complied with the knock-and-announce requirement.

The Court also has before it an alternative argument. And the Court doesn't need to reach this, but it's there if the Court needs it. And that's the alternative argument that, even assuming there was a violation of knock and announce that couldn't be excused by some exigency, we have the intervening act of Mr. Ramirez firing off rounds at the police or, as he characterizes it, firing up into the ceiling to scare them off. Well, they can hardly be expected to believe that he was simply trying to warn them under the circumstances when one of the deputies was hit in the eye with a piece of metal.

Under those circumstances, you have a break in the chain which, under the law, would terminate the application of the exclusionary rule at that point. And that's why I cited a number of cases from a number of different jurisdictions which demonstrate how this rule applies, that whether it's an illegal search or an illegal arrest, that when the defendant or the person being searched, the person being arrested, reacts violently, then the exclusionary rule doesn't apply at that point, because that is conduct on the part of the defendant himself which the officers not only have a right to respond to, they have an obligation to respond to.

And here they did respond appropriately. They went ahead and executed the warrant. They saw the gun in the living room where Mr. Ramirez had thrown it. Then they got another warrant. And, as the Court has referenced that, that was a follow through on their exercise of good faith in this case.

THE COURT: Could they have seized the gun right then and there without the second warrant?

MR. PEIFER: I think that they could have, because it was in plain view. It wasn't -- it was probably an exercise of extreme caution on their part not to seize it. But it was in plain view during the execution of the warrant when they were looking for Mr. Shelby. They didn't have to move anything to find it. But they did get another warrant. And that was certainly, as the Court noted, a further exercise of good faith on their part.

So we actually have three elements of good faith shown in this case. We have the warrant itself, the initial warrant, which obviously was signed by Judge Ashmanskas under the protection of the warrant requirement. They asked Judge Ashmanskas to authorize a no-knock entry.

Now, there is no -- and Mr. Levine is right. There is no statutory provision for this, but they ran it past the Court. They gave him the facts and asked for a judicial opinion. It's not controlling, but it does show

that they were acting in good faith. They didn't just go and do it on their own without running it past the Court. And, thirdly, they went and got a second search warrant, instead of, as the Court noted, simply following through on what they had actually seen, which showed further good faith.

But I want to make clear to the Court that the good faith exception does apply here, but it's not necessary to reach that, and it's not necessary to reach the exclusionary rule argument either, that this is a case where there was ample probable cause, and there was every good reason to not comply technically with the knock-and-announce requirement.

And on that regard, there was a technical violation of the knock-and-announce requirement. They did not wait after announcing before they broke and entered. All it was was the garage window instead of the door, which is normally what happens in a search situation. But -- we're not quarreling with that as being a violation, but it's not the kind of egregious violation that could have occurred in this case but didn't.

When you have 45 law enforcement officers surrounding a house, you can imagine what they could have done if they wanted immediately to enter, but they didn't do that. They took a very measured, careful approach to

the matter and complied with the law every step of the way.

Thank you.

THE COURT: Anything further, Mr. Levine?

MR. LEVINE: Yes, Your Honor. I don't think it shows good faith to ask a magistrate for something that the magistrate has no authority to do. The officers should have told the magistrate, "We're asking you for authority to enter without knocking and announcement, but there's no statutory authority for you to make this." They didn't tell the magistrate -- to enter that order. They didn't tell the magistrate that. I don't see why -- how that evidences good faith.

Second, the agents did not overhear -- the informant did not overhear the person named Allen say, "I had to knock out a guard." It's quite clear in the affidavit that what the informant heard was approximately that statement. That's in the affidavit. Now, that is a fundamentally important word, Your Honor, because that means, as I've argued, that the informant is not reporting the exact words that this Allen said.

But that's critical, because the way it's phrased here, "I had to knock out a guard," that's quite one thing if those were the exact words spoken. But if they were not the exact words spoken, and the word "approximately" says those were not the exact words spoken,

what you really have here is you don't know what -- you don't know what was said by Allen. Was it something about a guard or something -- did he use the word "hard," or did he -- how was the phraseology?

The government is presenting this as if these are the exact words and arguing that to the Court, and that's not the case, by their own affidavit.

THE COURT: Let me ask you the same question I asked Mr. Peifer.

MR. LEVINE: Yes.

THE COURT: Once the officers are inside and executing a warrant for Mr. Shelby, they see the gun laying in the living room on the floor, can they seize it?

MR. LEVINE: Well, I don't know what theory they would seize it. It's not a crime at this point. There's no -- it's not a crime for a person to possess a gun. They never charged him -- they've never -- I suppose if they were to charge him -- it's a crime for an ex-felon to possess a gun, but there's no knowledge at this point that he's an ex-felon. That doesn't come until they interview Mr. Ramirez.

THE COURT: I thought at the scene he indicated he, in fact --

MR. LEVINE: Oh, I'm sorry. Are you talking about -- well, yes, but the timing of when they -- they

don't actually come into the house until the second warrant. They tear gas -- all of the facts are not in the stipulated facts, but what happens is -- correct me if I'm wrong -- the -- after the -- after the shots are fired, there's no further effort at entry. There's ultimately more bullhorning and ultimately Mr. Ramirez's wife and his child come out of the house.

The agents don't enter the house. They proceed to tear gas the house for quite a lengthy period of time, because apparently they believe that Mr. Shelby is -- might be in the house. So there's about a two-hour delay. Though Mr. Ramirez is interviewed by Mr. Kim after he comes out of the house and explains what happened and why he shot, and it's that -- at that time, I believe, that Agent Kim learns that Mr. Ramirez is a felon.

So the entry -- the entry into the house does not occur until the second warrant. Now, the agents may believe that there's a gun in the house, since Mr. Ramirez fired a gun, and he also tells them that there was a gun in the house. There's no question that they have -- they have a belief at that point, right from Mr. Ramirez and right from the fact that a gun was fired, that there's a gun in the house. But it wasn't a question of their going in and seeing the gun.

THE COURT: That's not the way I understood the

evidence.

MR. LEVINE: Maybe I have it wrong.

MR. PEIFER: It's in the second search warrant affidavit, which has been incorporated into the entire stipulation, that deputy -- or Detective Green, of the Clackamas County Sheriff's Office, described the gun that was found. Of course, this is before Agent Kim got the second warrant. So that was -- that was done prior to that time and incorporated into the search warrant.

MR. LEVINE: Well, even if -- even if -- even if I have the series of events wrong, even if they saw -- maybe they went in initially and did a quick run-through and saw the gun on the floor, the Court has asked me whether they could seize it. Again -- again, I -- they couldn't seize it because it's ex-felon in possession, because they still don't know he's a felon unless Kim had communicated to them that he was a felon. There's no evidence of that.

If they were charging him with assault on an officer, I suppose a firearm could be evidence of that crime, and they could seize the gun as -- but there never were any charges brought against Mr. Ramirez, and there haven't been to this day. So I think the answer is no, generally speaking, to the question.

With respect to the period of time that

elapsed that Mr. Shelby was on the property -- but this -- this still adds -- still does not suggest that Mr. Shelby -- the fact that he was seen two days on the property does not mean that he's on the residence. Workers, people who are working, laborers, are often on people's property. They simply go home at night and come back to the property during the daytime. We don't assume that laborers are sleeping in the bedroom or in the residence.

The firearm was not in the garage. The firearm was in the utility -- was taken from the utility room, which is next to the garage, but it's not in the garage, as -- the informant had said supposedly they were kept in the garage. That proved not to be the case at all.

THE COURT: Well, the Court will take the matter under advisement, and I'll issue an opinion. I don't recall. Is there a pending trial date in this case?

MR. PEIFER: Yes, Your Honor. I don't have it.

MR. LEVINE: I don't believe there is.

MR. PEIFER: No, there is a date in May. I think it's the third week in May.

THE COURT: It won't take us long. Thank you very much.

(Hearing concluded)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-30158

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

HERNAN RAMIREZ,

Defendant-Appellee.

UPON APPEAL FROM THE JUDGMENT OF THE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

THE HONORABLE ANCER L. HAGGERTY

No. CR 94-379-HA

BRIEF OF THE PLAINTIFF-APPELLANT

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STATEMENT OF THE CASE

A. Jurisdiction, Timeliness and Custody Status

The district court had jurisdiction in this criminal case by virtue of 18 U.S.C. § 3231, while this court's appellate jurisdiction arises under 18 U.S.C. § 3731, governing interlocutory appeals by the United States.

The district court on May 4, 1995, entered an order suppressing evidence (CR 34; ER 71).[1] The government filed a timely notice of appeal on May 11, 1995, including a certification on appeal by the United States Attorney (CR 37-38; ER 73-74).

Defendant has been released on conditions during the pendency of this appeal.

B. Summary of Proceedings

The grand jury indicted defendant for felon in possession of firearms, in violation of 18 U.S.C. § 922(g)(1), based upon his prior convictions of rape by force and violence, burglary of a residence while armed with a firearm, and unlawful use of force upon a peace officer (CR 10; ER 1-2). Defendant filed a motion to suppress evidence, based on alleged lack of probable cause for the search warrant and non-compliance with the knock-and-announce requirement (CR 19-20; ER 3-27). The parties submitted the matter on written stipulated facts (CR 31; ER 51-55), memoranda of law (CR 20, 25, 32; ER 5-27, 28-50, 56-61), and oral arguments

[1] "CR" refers to the Clerk's Record; "ER" refers to the Government's Excerpt of Record; "RT" refers to the Reporter's Transcript of Proceedings.

(RT 2-31). In ordering suppression of evidence, the district court denied defendant's motion on the contention that the search warrant was unsupported by probable cause, but agreed with defendant that violation of the knock-and-announce requirement necessitated suppression (CR 34-35; ER 62-70). This interlocutory appeal by the government followed.

STATEMENT OF FACTS

The facts adduced for the suppression hearing consisted of (1) the initial search warrant for defendant's residence and its supporting affidavit by Deputy U.S. Marshal Wayne Kauffmann (CR 20, Exh. A; ER 20-17); (2) the second search warrant for defendant's residence and its supporting affidavit by Special Agent George Kim of the Bureau of Alcohol, Tobacco and Firearms (CR 25, Exh. A; ER 42-49), and (3) a written stipulation of facts by the parties (CR 31; ER 51-55). The stipulation and the search warrant documents set forth the following undisputed facts on the knock-and-announce issue:

In the pre-dawn hours of Saturday, November 5, 1994, defendant, his wife Cynthia, and his three-year-old son Christopher were asleep in the residence at 23170 Bohna Park Road in rural Boring, Oregon. The residence has three bedrooms (including a master bedroom), a living room, kitchen, and an attached garage. (A diagram of the property is attached as Appendix A.) This property covers several acres and includes, in addition to the residence, (1) a large workshop building, located about 195 feet south of the main residence (Diagram "E" in

Appendix A); (2) a large travel trailer located about 75 feet west of the workshop (Diagram "F"); (3) a small utility trailer, located about 75 feet from the southwest corner of the residence (Diagram "D"); and (4) a small travel trailer, located immediately adjacent to the east side of the garage (Diagram "C") (ER 51-52).

At about 6:15 a.m., about 45 armed law enforcement officers converged on the property to execute a federal search warrant for the person of Alan Lawrence Shelby. A federal and state fugitive, Shelby had slipped from his handcuffs and struck a deputy sheriff to escape while en route to testify on an associate's behalf in Tillamook County (ER 52). Shelby had a history of escapes, violent conduct, and criminal convictions and had vowed that he would escape again and would not serve time in a federal prison (ER 22, 52). Agents obtained information from a person termed a confidential, reliable informant, that indicated that Shelby had been present on the defendant's property. Other information from the same informant indicated that the defendant himself was possibly involved in drugs, which he kept in the garage. The informant also indicated there were supposed to be several guns in the garage (ER 52).

Shelby's first violent escape was in 1991, when he hit a jailer in the face and kicked out a jail door. He then assaulted a woman, stole her car, and rammed a police vehicle. More recently, while awaiting trial on narcotics and weapons charges, Shelby had attempted a forcible escape by making a rope from bed

sheets and breaking a window. He had also threatened to kill witnesses and officers associated with his incarceration and had brutally tortured others in the past with a hammer (ER 22). As a major methamphetamine manufacturer, Shelby had access to large caches of weapons (ER 23).

The U.S. Marshal sought authorization from the issuing magistrate to serve the search warrant for Shelby at night and to do so without compliance with the knock-and-announce requirement set forth in 18 U.S.C. § 3109. The marshal prepared the warrant with the appropriate language, and the magistrate signed it (ER 52).

Special "SWAT" teams of state, county, and city officers surrounded the property. The Portland Police SWAT team was responsible for clearing and securing the large workshop building, the large travel trailer, and the small utility trailer. The Clackamas County Sheriff's SWAT team was be responsible for securing the garage area of the residence through the east side window and for securing the travel trailer on the east side of the driveway immediately adjacent to the two-car garage (Diagram "C") (ER 52).

Officers entered the unlocked and empty travel trailer in the driveway. While this was occurring, other officers passed the location of the travel trailer to other parts of the property (ER 52-53).

Thereafter, Deputy Barnum broke out the glass of the garage window. While he did so, Sergeant VeraCruz shouted several

times, "Sheriff's Office, Search Warrant," at the window. VeraCruz then began to "gunport" the window, that is, aiming and moving his gun through the window ready to shoot if necessary, but he had trouble when the window's curtain got in his way (ER 53).

At about the same time as this activity at the garage window, an Oregon State Police officer was talking through a portable loud speaker system located at the front of the house. Sergeant Lowe, while at the garage window, was unable to hear what was being announced by the OSP officer because of VeraCruz' yelling. OSP Lieutenant Geistwhite, however, was present in front of the house next to Detective Lockwood and heard him announce over the loudspeaker:

> State Police--search warrant. Attention inside 23170 SE Bohna Park. This is the State Police. All occupants inside 23170 SE Bohna Park, you are instructed to come out the front door now. Do not resist. Have hands on heads. You will not be harmed.

(ER 53).

Inside the residence, defendant and his wife were awakened by outside noises. Neither could determine what the noises were. Defendant then heard the breaking of glass, and he and his wife thought they were being burglarized. Both he and his wife feared for their safety and that of their child who had awakened and was crying. After hearing the glass breaking, defendant ran to the laundry room closet, obtained a pistol, and ran to the entrance of the garage area. In a state of panic, defendant fired toward the ceiling in an effort to scare away the intruders. A fragment

of metal struck VeraCruz in the face causing a slight wound (ER 53).

The law enforcement officers returned fire and simultaneously shouted "police, police." Realizing, for the first time, that law enforcement officers were outside and trying to enter his residence, defendant ran to the living room, threw away the firearm across the floor, and threw himself on the floor in a prone position, shaking from fright. Defendant states that, had he known that the police were trying to enter his home, he never would have fired the weapon. Ultimately, defendant and his wife, who was carrying their child in her arms, walked out of the house and into police custody. Despite a thorough search of the property, the officers did not find Shelby on the premises (ER 53-54).

About 6:35 a.m., ATF Agent George Kim interviewed defendant. After advice and waiver of Miranda rights, defendant admitted he had fired the weapon, that he owned the gun he used as well as another one in the house, and that he was a convicted felon. He said that he had been awakened by noises outside his house and heard the sound of breaking glass. He said he shot up in the air to scare away people he thought were trying to burglarize his home. Because they were asleep, defendant said, neither he nor his wife had heard any announcement of identity by the officers. Shown a picture of Shelby, defendant said that a man with that appearance might have been present on the property two days earlier (ER 54).

Mrs. Ramirez also said that she did not know that the police were trying to enter her home and that she believed she was being burglarized and/or attacked by intruders (ER 54).

Agent Kim used the information furnished by defendant, along with a searching officer's observation of the gun on the living room floor, to obtain another search warrant (attached to the government's memorandum in opposition of defendant's motion to suppress, and incorporated into the stipulation) (ER 42-59, 54). Executing the second warrant, agents reentered the house later the same day and retrieved the pistol on the living room floor and a second one located in a box as defendant had described (CR 31; ER 51-55).

SUMMARY OF ARGUMENT

Specific, articulable facts created exigent circumstances and justified the officers' non-compliance with the statutory and constitutional knock-and-announce rule. There was probable cause to believe a dangerous escaped federal felon was hiding inside defendant's house. The fugitive had committed several prior forcible escapes, had vowed that he would never serve time in a federal prison, and had access to firearms. Further, there was reason to believe defendant himself kept drugs and guns in his garage. Under the circumstances, it was reasonable and lawful for the officers to break out and "gunport" the garage window before allowing the occupants to respond to the announcement of

Alternatively, any arguable illegality by the police did not require application of the exclusionary rule because of defendant's intervening act of responding with gunfire. His own violent conduct justified police entry, discovery of the firearm, and a second search warrant, thereby purging any alleged taint from non-compliance with the knock-and-announce rule.

ARGUMENT

THE DISTRICT COURT ERRED IN SUPPRESSING EVIDENCE FOR NON-COMPLIANCE WITH THE KNOCK-AND-ANNOUNCE RULE.

A. Standard of Review

Suppression for alleged failure to comply with the knock-and-announce requirement is reviewed de novo as a question of law. United States v. Becker, 23 F.3d 1537, 1539 (9th Cir. 1994). Underlying factual findings are reviewed for clear error. Id.

B. Discussion

Defendant sought suppression of the firearms found in his house on three grounds: (1) the alleged failure of the first search warrant's affidavit to establish probable cause that the fugitive Shelby was in defendant's house, (2) failure to comply with the knock-and-announce requirements of 18 U.S.C. § 3109, and (3) improper execution of the warrant in violation of the Fourth Amendment's knock-and-announce rule. The district court rejected defendant's probable cause argument but suppressed on the ground that there was insufficient exigency to justify the officers' breaking a garage window before complying with the knock-and-

announce rule. The court erred in that holding. Further, the court erred in rejecting the government's alternative argument that, even assuming unlawful conduct, the exclusionary rule should not apply because of defendant's intervening gunfire.

1. Exigent Circumstances Justified the Officers' Breaking the Garage Window Before Waiting for the Occupants to Respond to the Announcement.

Officers serving a search warrant at a house ordinarily must announce the authority under which they are acting and the purpose of the call. If they are refused admittance to the premises after the announcement, they may enter forcibly. 18 U.S.C. § 3109; United States v. Woodring, 444 F.2d 749 (9th Cir. 1971). Courts relax these requirements, however, when exigent circumstances make observance of the statute inappropriate. See United States v. Turner, 926 F.2d 883, 886-87 (9th Cir.), cert. denied, 502 U.S. 830 (1991). Here, the officers announced their identity and purpose but, for safety reasons, did so as they broke the garage window and thus did not wait for the occupants to respond. Their actions were nonetheless reasonable and lawful under all the circumstances.

The most recent case in the Ninth Circuit on the subject of forced entry is United States v. Becker, 23 F.3d 1537, 1541 (9th Cir. 1994), where the court held that "mere unspecific fears" about peril to officers do not justify relaxation of the rule. Becker discussed a two-tiered approach to exigency. Citing United States v. McConney, 728 F.2d 1195, 1206 (9th Cir. 1984)

(en banc), the court stated that "even mild exigency, like knowledge that a person is dangerous, can justify immediate entry where that can be done without any physical destruction of property." Becker, 23 F.3d at 1540. See also United States v. Arias, 923 F.2d 1387, 1391 (9th Cir. 1991). To justify physical destruction of property (as occurred here), "[m]ore specific inferences of exigency are necessary." Becker, 23 F.3d at 1541 (quoting McConney, 728 F.2d at 1206).

Ninth Circuit decisions have further demonstrated the types of circumstances that do not justify forced entry. In United States v. Mendonsa, 989 F.2d 366, 370-71 (9th Cir. 1993), there was insufficient exigency based merely on the occupant's prior armed robbery conviction, a little noise inside the house, and the "inherently dangerous job of arresting drug dealers." Officers in United States v. Moreno, 701 F.2d 815, 817-18 (9th Cir. 1983), vacated on other grounds, 469 U.S. 913 (1984), the court held that feared destruction of evidence, just because there was "always" a danger in drug cases, was not an adequate reason for forced entry. Although officers in United States v. Fluker, 543 F.2d 709, 717 (9th Cir. 1976), believed an occupant owned a gun and there was a general fear that narcotics might be destroyed, there was insufficient exigency. Finally, in Becker, there was no exigency based on a generalized fear that the homeowner might be dangerous and that a methamphetamine laboratory might be on the premises.

The highly specific facts indicating dangerousness in the present case stand in sharp contrast to the "generalized fears" and skimpy facts outlined in the above decisions. The district court correctly stated in its probable cause holding that there was ample reason to believe the fugitive Alan Lawrence Shelby was present at defendant's house. As set forth in detail in the search warrant affidavit (ER 20-27), Shelby had a history of escapes and assaultive behavior. A few days earlier, he had escaped from a deputy sheriff by slipping out of handcuffs, striking the deputy and knocking him down. Shelby was serving long federal sentences for manufacturing methamphetamine and use of a firearm during a crime, concurrently with a state sentence for armed robbery at the Oregon State Penitentiary. Shelby had accurately predicted he would escape from a transport van if given the opportunity and vowed he would "not do federal time" (ER 22).

In 1991 Shelby struck a corrections officer in the face and kicked out a jail door. While fleeing the jail, he assaulted a woman, stole her vehicle, and then rammed a police vehicle. While awaiting trial on narcotics and weapons charges in Eugene, Shelby attempted a jailbreak by constructing a rope from torn bed sheets and breaking a window (ER 22). He had threatened to kill witnesses and police officers associated with his incarceration. Also, Shelby had used a hammer brutally to torture people. A major methamphetamine manufacturer, he had access to large caches of weapons (ER 22-23).

For these very specific and detailed reasons, the officers considered Shelby to be an extreme danger to their safety. There was every reason to believe he would not submit peaceably to their authority but would, as usual, react violently. "Armed and dangerous" understates his status and the peril faced by law enforcement officers in attempting to recapture him. Also, the officers had information that defendant himself kept drugs and guns in the garage, which his later violent reaction confirmed (ER 52). The officers thus had a highly persuasive basis for non-compliance with the knock-and-announce rule. This case presents precisely the type of exigent circumstances contemplated by Becker to justify forced entry without waiting for dangerous occupants to respond to the officers' announcement.

In addition to his argument under 18 U.S.C. § 3109, defendant contended -- and the district court agreed -- that the officers' actions were unreasonable under the Fourth Amendment. There is no authority for the proposition that the federal constitution provides broader protection or a stricter knock-and-announce rule than that of § 3109 in federal cases, and the district court did not so hold. Rather, it appeared to treat them as synonymous (ER 70, 71).

In the recent case of Wilson v. Arkansas, 115 S. Ct. 1914 (1995), the Court held that whether officers knock and announce their presence and authority before entering a dwelling, as required by common law, is a factor to be considered in determining the reasonableness of a search under the Fourth

Amendment. While confirming the incorporation of the common-law rule into the Fourth Amendment, the Court nonetheless stressed the age-old exception that "the presumption in favor of announcement would yield under circumstances presenting a threat of physical violence." Id., 115 S. Ct. 1918-19 (citations omitted). That, of course, was precisely the situation presented here, and the officers responded reasonably by breaking out the window simultaneously with their announcement to the occupants. Without cataloging all the relevant countervailing factors, the Supreme Court in Wilson simply held that, "although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry." Id. at 1919. Here, the same demonstrated exigencies that sufficed to excuse § 3109 compliance also met the Fourth Amendment reasonableness test.

The magistrate's endorsement of a "no-knock" clause in the first warrant, while not explicitly authorized by statute, in no way illegitimized the officers' conduct. If anything, the endorsement manifested their good faith in submitting the matter to judicial analysis prior to the warrant's execution. It certainly did not affect the legality and constitutionality of the forced entry, which passes muster under the objective exigency test discussed above.

2. In the Alternative, Defendant's Intervening Gunfire Makes Application of the Exclusionary Rule Inappropriate.

The government's primary position, both on appeal and in the district court, is that a specific showing of exigency excused compliance with the knock-and-announce rule. Even assuming, arguendo, that position is incorrect, it does not follow that the court must exclude evidence of the two firearms forming the basis for defendant's indictment. Rather, defendant's intervening act of firing his weapon renders the exclusionary rule inapplicable to the firearms since they were not "fruit of the poisonous tree."

Wong Sun v. United States, 371 U.S. 471, 487-88 (1963), the seminal case in the field, described the limitations of the exclusionary rule:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made was come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

There is a body of law holding that, when a person subjected to an allegedly illegal search or arrest responds with force against the officers, resulting evidence is not fruit of the poisonous tree. See 4 La Fave, Search and Seizure: A Treatise on the Fourth Amendment § 11.4(j) (2d ed. 1987 and 1994 Supp.). Here, the discovery and ultimate seizure of the firearms (under a

second search warrant) resulted from defendant's use of force against the officers, not from any exploitation of what defendant asserts was illegal activity.

Several federal cases illustrate this point. In United States v. King, 724 F.2d 253 (1st Cir. 1984), the court assumed, without deciding, that the officers committed some illegality in attempting to search defendant, but he responded by shooting at them. "We believe the shooting was an independent intervening act which purged the taint of the prior illegality," the court stated. Id., 724 F.2d at 256. King cited favorably United States v. Bailey, 691 F.2d 1009 (11th Cir. 1982), cert. denied, 461 U.S. 933 (1983), and United States v. Nooks, 446 F.2d 1283 (5th Cir.), cert. denied, 404 U.S. 945 (1971), where the courts admitted evidence discovered when an illegal stop was interrupted by a defendant's flight. "In each case the search was in progress when flight occurred. In each case the court held that the flight constituted an intervening act which provided probable cause for the ultimate search." King, 724 F.2d at 256.

United States v. Waupekenay, 973 F.2d 1533 (10th Cir. 1992), reached the same result for a different reason. Defendant in that case pointed a gun at the police after they had illegally entered his premises. The court held:

> We conclude that Mr. Waupekenay did not have a legitimate reasonable expectation of privacy when he initiated criminal activity--assault--in the presence of the police officers within the trailer. Once Mr. Waupekenay was aware that the police officers were present in his home and were observing him, he could not have had a reasonable

> expectation of privacy for any actions initiated subsequently to that time in their presence. He obviously intended for the police to see him aim a semi-automatic weapon at them. Thus he could not have had a legitimate expectation of privacy in that action.
>
> . . . .
>
> Our decision is consistent with the holding of many other courts, state and federal, that have considered situations in which a defendant seeks to suppress evidence relating to his or her violence or threatened violence toward police officers subsequent to an unlawful search or seizure or a warrantless entry. In assault, resisting arrest, disorderly conduct, and weapons related trials, these courts have uniformly rejected motions to suppress arising from skirmishes comparable to the one at issue in the instant case . . . .

Id., 973 F.2d at 1537 (citations omitted). In addition to King and Nooks, the court in Waupekenay cited 13 other state and federal cases supporting its holding in similar contexts.

Among the many state court opinions on this issue, Illinois v. Villarreal, 152 Ill. 2d 368, 604 N.E.2d 923, 178 Ill. Dec. 400 (1992), deserves mention. The Illinois Supreme Court held that defendants were precluded from resisting the police officers' attempt to enter a house to arrest a third party, regardless of whether the police actions would have been legal. The exclusionary rule cannot be applied to suppress actions directed against the police, even when the police illegally enter a defendant's home to arrest another person. Id., 604 N.E. 2d at 927.

Here, defendant responded to the officers by firing his pistol from his home. His intervening action created an independent basis for what followed, namely, his removal from the house, his questioning (with admissions of gun ownership and felon status), and seizure of the firearms pursuant to a second search warrant. Even if there were arguable illegality in the initial police conduct, all the intervening events occasioned by defendant's armed resistance (including the seizure of the guns) are not subject to the exclusionary rule.

CONCLUSION

For the above reasons, the district court's order suppressing evidence should be reversed and the case remanded for trial.

DATED this 14th day of August, 1995.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-30158

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

HERNAN RAMIREZ,

Defendant-Appellee.

UPON APPEAL FROM THE JUDGMENT OF THE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

THE HONORABLE ANCER L. HAGGERTY

No. CR 94-379-HA

REPLY BRIEF OF THE PLAINTIFF-APPELLANT

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ARGUMENT NO. I

THE OFFICERS HAD AMPLE INFORMATION TO JUSTIFY THEIR BREAKING A WINDOW TO OBTAIN ENTRY TO THE HOUSE AT THE SAME TIME THAT THEY ANNOUNCED THEIR PRESENCE.

Both defendant and the district court err in their contention that the officers lacked sufficient information to justify breaking the garage window simultaneously with their announcement of presence. Unlike United States v. Becker, 23 F.3d 1537, 1541 (9th Cir. 1994), where "there was no specific information that Becker himself was armed or dangerous," here the information amply demonstrated both.

Alan Lawrence Shelby was an escapee who had already engaged in violence in effecting his most recent escape; he had a prior record of using violence in escaping; he was serving time for a firearms offense and a dangerous drug crime; he had a reputation for violence against people who got in his way; through his methamphetamine connections, he had access to firearms; and, last but not least, he had boasted that he would not do time in a federal prison. Also, there were grounds to believe defendant kept guns and drugs in the attached garage, the focus of the officers' concern. Against this background, it borders on the absurd to contend that the officers were not in specific danger and that they could only enter the house unannounced if they found an open door or window.

Defendant and the district court seem to rest their position on the absence of an eyewitness actually seeing Shelby in possession of a firearm. Becker certainly imposes no such

requirement, however. Instead, Becker requires "specific information" to believe an occupant is armed or dangerous. Id. at 1541. The information at hand more than met that burden. A reasonable person could easily infer from the specific information that Shelby was dangerous, armed, and likely to respond with violence to any attempt to arrest him.

Under the circumstances, securing the garage first was a sensible plan fully supported by reason and common sense. The officers reasonably feared a violent response, and they took careful, limited measures to meet that threat. What were their alternatives? One alternative could have been to knock, announce, and wait for a response, which could well have been Shelby firing at them in the dark. Another alternative could have been searching (probably in vain) for an unlocked door, entering unannounced, and facing a fate worse that what actually occurred. Or, they could have broken down doors with perhaps an even worse result.

In fact, the officers' intrusion was minimal. Again in contrast to Becker, they did not break down any doors or engage in extensive destruction of property as part of their plan. Instead, they broke a single window in the garage. (Later, unplanned damage occurred only in response to defendant's gunfire.)

The district court's decision is perplexing. Under its decision, officers who have strong reason to believe they face a dangerous situation in executing a warrant may open an unlocked

door and enter a house, but they may not break open a window, much less break down a door. That rule does not protect the officers, because it is fortuitous whether they will find an open door, and it does little to further the Fourth Amendment rights of the occupants, because in both cases the officers have entered the house without knocking and announcing their presence.

The Supreme Court has ruled that "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by a warrant -- subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'" Dalia v. United States, 441 U.S. 238, 257 (1979). The officers' actions here were entirely reasonable in view of the demonstrated and serious threat to their safety in arresting a dangerous, even crazed, felon.

ARGUMENT NO. II

ASSUMING AN UNJUSTIFIED KNOCK-AND-ANNOUNCE VIOLATION, DEFENDANT'S GUNFIRE WAS AN INTERVENING ACT RENDERING THE EXCLUSIONARY RULE INAPPLICABLE.

Defendant's act of shooting from his house at the officers supplied an intervening event that broke the chain of causation between the asserted Fourth Amendment violation and the receipt of the guns. The government's position regarding this issue is fully discussed in its opening brief and need not be restated here. Defendant's principal reply is that, because he did not know he was shooting at the police, there was no attenuation of the alleged taint. That really misses the point, however.

The pertinent issue is whether there was an independent intervening act that, in effect, justified the subsequent police conduct of entering defendant's house and obtaining a second search warrant for the guns. What defendant knew, thought, or intended does not change the fact that he initiated gunfire which broke the earlier chain of causation between the asserted Fourth Amendment violation and the receipt of the guns.

Furthermore, the asserted police error in this case, even more than in the typical case of a knock-and-announce violation, had no causal link to the receipt of evidence. That is because the court below (following the magistrate who authorized an unannounced entry) found that an unannounced entry was justified; it was merely the breaking of the garage window as part of that entry that was not. The exclusionary rule should not apply to such an alleged violation, particularly when the police are met with gunfire.

Stated another way, the privacy interests protected by the knock-and-announce rule were validly compromised, as both the district court and the magistrate indicated, with a warrant that itself authorized a no-knock entry. The only violation was to the property interests served by the rule (i.e., the broken pane of glass). There is no causal connection between the property violation and the fruits of the search, except in the most attenuated sense, most especially after defendant himself initiated the gunfire.

ARGUMENT NO. III

THE DISTRICT COURT CORRECTLY HELD THAT THERE WAS PROBABLE CAUSE SUPPORTING THE SEARCH WARRANT FOR THE FUGITIVE AT DEFENDANT'S HOUSE.

Defendant's alternative argument, that the initial search warrant lacked probable cause to believe the fugitive Shelby was present at defendant's house, was correctly rejected by the district court.

The law has long recognized a preference for warranted rather than warrantless searches, and thus the magistrate's determination of probable cause is paid great deference by reviewing courts. Spinelli v. United States, 393 U.S. 410, 419 (1969); United States v. Ventresca, 380 U.S. 102, 109 (1965). Affidavits are to receive a reading based on reason and common sense, without the application of a hypertechnical standard of review.

> . . . [T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants must be tested and interpreted in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no place in this area. A grudging or negative attitude toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

Id., 380 U.S. at 108.

According to Illinois v. Gates, 402 U.S. 213, 236 (1983), after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. Rather,

the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis" for the probable cause finding. Id. (quoting Jones v. United States, 362 U.S. 257, 271 (1960)); United States v. Di Cesare, 766 F.2d 890, 896 (9th Cir. 1985). Probable cause does not demand a showing that the belief be correct or more likely true than false. United States v. Murray, 751 F.2d 1528, 1532 (9th Cir. 1985). A practical, non-technical probability that contraband or other criminal evidence (or, in this case, the fugitive Shelby) will be found in a particular place is all that is required. Texas v. Brown, 460 U.S. 730 (1983); United States v. Seybold, 726 F.2d 502, 503-504 (9th Cir. 1984).

Under these standards, the search warrant affidavit contained more than adequate probable cause to believe Alan Lawrence Shelby was present in defendant's property, including inside his house, on November 5, 1994. A confidential, reliable informant told ATF Special Agent Kim that he had seen a man named "Alan" at the residence who made the approximate statement, "I had to knock out a guard." The informant made the connection between "Alan" and Shelby when he read an article about the escape. Kim already considered the informant reliable based on earlier correct information he had provided, including facts that had led to the arrest of another fugitive felon.

Kim drove the informant near the house, and they saw a man they believed to be Shelby washing a car outside defendant's house. Kim found the man to be "very similar" to a photograph of

Shelby, and the informant said he was the same man he had previously seen at the residence (who was named "Alan" and said, in effect, he had had to "knock out a guard"). Kim was close enough to see what "Alan" was wearing and that he was "clean cut."

Deputy U.S. Marshal Wayne Kauffmann, the affiant for the search warrant, drove by the residence as well. In addition to viewing the house and numerous outbuildings on the 10-acre parcel, Kauffmann saw a man resembling "Alan" come out of the house, but because of the distance he could not make a positive identification. Like Kim, however, Kauffmann was close enough to make out the man's clothing and "clean cut" appearance.

Viewed in a common-sense and realistic fashion under the totality of the circumstances, the affidavit established a "substantial basis" for the magistrate to find that Alan Lawrence Shelby probably would be found in defendant's house. The reliable informant's first-hand information about "Alan," who said, in effect, that he had knocked out a guard, coupled with the corroborative observations of Kim and Kauffmann, persuasively established Shelby's presence at the location shortly before the warrant issued. The magistrate reasonably inferred from the facts that Shelby likely was staying there, so he would be found in the residence itself.

Defendant's argument against probable cause is the same timeworn, hypertechnical approach to search warrant analysis that federal courts have uniformly rejected. To posit, as defendant

did in the district court (ER 10), that the remark about having to "knock out a guard" might refer to playing touch football is directly contrary to the requirement that affidavits be interpreted in a commonsense and realistic fashion. The same is true of his criticisms of the affidavit for not listing "Alan's" identifying characteristics and not establishing his identity with a higher degree of certainty. Probable cause does not demand certainty or correctness, only a "substantial basis for belief." That standard was more than adequately met here, and this court should not disturb the magistrate's finding.

The evidence, however, is admissible irrespective of whether probable cause supported the warrant. Under the "good faith" rule of United States v. Leon, 468 U.S. 897 (1984), and Massachusetts v. Sheppard, 468 U.S. 981 (1984), the Fourth Amendment exclusionary rule is inapplicable when officers have acted in reasonable reliance on a judicially issued warrant. There are only four circumstances under which the good faith exception does not apply, and none of those circumstances is present here: (1) if the warrant is based on a "bare bones" affidavit "so lacking in evidence of probable cause as to render official belief in its existence entirely unreasonable"; (2) if the warrant is based upon deliberate or reckless material misrepresentations by the affiant; (3) if the issuing magistrate has wholly abandoned the required neutral and detached judicial role; or (4) if the warrant's particularization of the place to be searched or the items to be seized is "so facially

deficient . . . that the executing officers cannot reasonably presume it to be valid." Leon, 468 U.S. at 923; see United States v. Michaelian, 803 F.2d 1043, 1046 (9th Cir. 1986). Defendant has not alleged, and cannot prove, any of these factors.

CONCLUSION

For the above reasons and all those discussed in the government's opening brief, the suppression order of the district court should be reversed and the case remanded for trial.

DATED this 16th day of October, 1995.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

HERNAN RAMIREZ,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

STATEMENT OF COUNSEL

In this case, a divided panel held that police officers violated the Fourth Amendment and the federal knock-and-announce statute when they broke a single window in the course of executing a warrant to search for a violent, potentially armed, escaped convict. By any standard, the officers acted reasonably, and the majority erred by second guessing the officers' determination, which had been validated by a federal magistrate judge in a "no-knock" warrant, that they faced circumstances allowing them to dispense with the requirement that they announce their presence before entering the dwelling. Rehearing en banc is warranted not only to correct the majority's erroneous decision, but also because, as both the majority and the dissent acknowledged, this Court's cases do not provide consistent guidance on the question when sufficient exigency exists to justify dispensing with the

announcement requirement.

QUESTION PRESENTED

Whether police officers violated the Fourth Amendment and 18 U.S.C. § 3109 by breaking a window of the defendant's garage while executing a "no-knock" warrant to search for a violent and potentially armed escaped convict.

STATEMENT

1. The Affidavit and the No-Knock Warrant: On November 1, 1994, while en route to testify at a state criminal trial, Alan Lawrence Shelby, a prisoner serving time for federal drug and firearms violations and on a state armed robbery conviction, slipped out of his handcuffs, assaulted a deputy sheriff, and escaped. On November 4, 1994, Deputy U.S. Marshal Wayne Kauffmann applied for a warrant to search defendant Ramirez's residence for Shelby. The affidavit in support of the application recounted that a previously reliable confidential informant had seen a person believed to be Shelby at Ramirez's residence in Boring, Oregon. The affidavit stated that the person had been introduced to the informant as "Alan" and had stated, "I had to knock out a guard" in the informant's presence. According to the affidavit, after receiving this information, an Kauffmann and an ATF agent had separately driven by Ramirez's residence and seen a man resembling Shelby. ER 23-24.

The affidavit also recounted that Shelby "had a history of violent escapes" and that he had stated that he would not "'do federal time.'" According to the affidavit, Shelby had attempted

to escape from custody in 1991 "by striking a corrections officer in the face and kicking out the door of the jail. Shelby ran from the jail and assaulted a woman in a parking lot and stole her vehicle. During the escape attempt, Shelby rammed a police vehicle with the stolen vehicle." The affidavit further stated that Shelby "has made threats to kill witnesses and police officers associated with his incarcertion" and that he "has brutally tortured others in the past with a hammer." Finally, the affidavit stated that Shelby "was a major Methamphetamine manufacturer and has had access to large caches of weapons." ER 21-22.

Based on the information in the warrant, a magistrate judge issued a warrant to search Ramirez's residence for Shelby. At Deputy Marshal Kauffmann's request, the magistrate included the following provision in the warrant: "because of exigent circumstances shown in the application, you are authorized to enter the premises without complying with the Knock-and-Announce requirement." ER 24.

2. The Search of Ramirez's Residence: Prior to executing the warrant, the officers received information from the informant that Ramirez might be storing several guns in his garage. ER 52, 67-68. On November 5, 1994, at about 6:15 a.m., about 45 law enforcement officers surrounded Ramirez's house. Through a loudspeaker, a police officer announced the officers' presence and ordered the occupants of the building to come out. At the same time, a police officer broke open the window of the garage, while another officer shouted "Sheriff's Office, Search Warrant." ER 53.

Awakened by the police activity, Ramirez initially thought that his house was being burglarized. He ran to a closet, grabbed a gun, and fired it into the ceiling. A short time later, Ramirez realized that the police had surrounded the house and surrendered. After receiving and waiving his Miranda rights, Ramirez admitted that he was a convicted felon and that he owned the gun that he had fired as well as another one. Ramirez further admitted that a man resembling Shelby had been at his house two days earlier. Based on Ramirez's statement and the officers' observation of the gun Ramirez had fired, the officers obtained another warrant and seized the two firearms.

3. The District Court's Decision: Ramirez was charged with possession of a firearm by a convicted felon. He moved to suppress the firearms seized from his house, and the district court granted the motion. ER 62-72. Initially, the court found that the government had presented probable cause sufficient to justify the issuance of the search warrant. The court found, however, that the officers had violated the federal knock-and-announce statute, 18 U.S.C. § 3109, by breaking the window of Ramirez's garage as they announced their presence. The court acknowledged that "there were specific facts known regarding Shelby's propensity to attempt escape, his disdain for federal incarceration, and his past willingness to use threats and violence as a means of intimidation." ER 68-69. It found, however, that the officers had shown insufficient exigenct circumstances because "there was no information that [Shelby] was armed and dangerous at defendant's home, or

that he would present any specific dangers to arresting officers if found there." ER 68-69.

4. The Panel Decision: A divided panel of this Court affirmed the district court's suppression order.[1] The majority employed a two-tier analysis drawn from United States v. Becker, 23 F.3d 1537 (9th Cir. 1994), in which a "mild exigency" justifies an unannounced entry "that can be done without any physical disruption of property" and "more specific inferences of exigency are necessary" to justify the physical destruction of property. The majority held that a sufficient level of exigency had not been shown here based on the following analysis:

> The 45 officers did not fear any of the actual residents of the house and were not attacking a gang or cult hangout where they might be met by a fusillade of gunfire. They were concerned about one person, Shelby, who might be on the premises. But Shelby was not known to have ever shot or shot at anyone. He was an escape artist, who said he would not go to federal prison. He had knocked people down in his escape attempts, and he had stolen a car and run into a police vehicle. His violence toward law enforcement had not extended beyond that, even though he had obviously been arrested on some occasions. Perhaps his degree of dangerousness bespoke a mild exigency. Certainly it did not bespeak more.

Slip op. 9465. The court also found a lack of specific evidence that Shelby was armed or that "when he was faced with [a] show of force he would do anything violent at all." Id. at 9467.

The majority then held that the illegal entry to the home required the suppression of the seized firearms. The court found that the "seizure of the guns * * * came as the most direct, if not the only, result of the" police "break-in." It rejected the

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[1] A copy of the panel decision is appended to this petition.

government's argument that Ramirez's firing of the pistol into the ceiling was an "intervening event" that broke the causal chain between the police entry and the seizure of the firearm.

Judge Kozinski dissented. He argued that the majority opinion "opens a square conflict with United States v. Turner, 926 F.2d 883 (9th Cir.), cert. denied, 502 U.S. 830 (1991)." Using a chart, Judge Kozinski then explained that in Turner on facts identical or less compelling than those presented here, the court had upheld a forcible, unannounced entry into a residence to execute a warrant. Judge Kozinski emphasized Shelby's history of violence and noted that the majority "tr[ies] to duck Turner by claiming that our cases 'graph a complex curve.'" Slip op. 9475 (quoting majority op. at 9467). He responded, "But if the law is in that much turmoil, we must call for sua sponte en banc." Slip op. 9475.

Judge Kozinski also argued that "[e]ven had the no-knock search been illegal, this would provide no grounds for suppression of the evidence pertaining to Ramirez." He asserted that the majority opinion raised intra-circuit conflicts on this issue as well. Slip op. 9477 (citing United States v. Jones, 608 F.2d 386 (9th Cir. 1979), and United States v. Garcia, 516 F.2d 318 (9th Cir.), cert. denied, 423 U.S. 934 (1975)). According to the dissent, suppression was not required because "police couldn't possibly be deterred by the threat of exclusion of evidence relating to a completely different person and crime" and because Ramirez's firing of the gun was an intervening act that dispelled the taint of any official illegality. Slip op. 9478-79.

REASONS FOR GRANTING THE PETITION

The majority held that the officers' breaking of a single garage window as they announced their presence while executing a search warrant for a violent escapee violated the Fourth Amendment and the federal knock-and-announce statute. The majority reached that conclusion based on its own detached and exacting assessment of the circumstances facing the officers. Measured against the reasonableness requirement of the Fourth Amendment, however, the officers acted properly when confronted with a violent and dangerous drug dealer.

The majority's conclusion creates a conflict with prior decisions of this Court and exacerbates the confusion in this Court's cases. Moreover, the current state of the law in this Circuit leaves police officers in the field with little guidance in an area where they are required literally to make life and death decisions. Accordingly, rehearing en banc is warranted.

1. In Wilson v. Arkansas, 115 S. Ct. 1914, 1918 (1994), the Supreme Court held that "in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment." The federal knock-and-announce statute, 18 U.S.C. § 3109, prohibits an officer from breaking into a house unless "after notice of his authority and purpose, he is refused admittance." As the Supreme Court explained in Wilson, however, "the Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." 115 S. Ct. at

1918. Instead, "the presumption in favor of announcement would yield under circumstances presenting a threat of violence." Ibid. Likewise, this Court has held that "a police officer's 'reasonable belief that announcement might place him or his associates in peril * * * justifies non-compliance with the announcement provisions'" of Section 3109. United States v. Manfredi, 722 F.2d 519, 524 (9th Cir. 1983) (quoting United States v. Kane, 637 F.2d 974, 978 (3d Cir. 1981)).

Thus, under both the Fourth Amendment and Section 3109, an officer may make an unannounced entry into a dwelling if he reasonably believes that announcing his presence would create a danger to himself or others. Here, the officers plainly acted reasonably. At the time that they executed the warrant, they had the following information concerning Shelby: (1) Shelby had been convicted of drug and firearm offenses and of armed robbery; (2) he had escaped from custody by assaulting a police officer; (3) three years earlier, he had attempted to escape by assaulting a corrections officer and a bystander and by using a stolen car to ram a police car; (4) he had stated that he would not "do federal time"; (5) he had threatened to kill witnesses and police officers associated with his incarceration; (6) he had "brutally tortured others in the past with a hammer"; and (7) he had access to firearms.

In addition, the officers had received information that Ramirez kept firearms in the garage. Finally, the officers had presented the facts concerning Shelby's violent conduct to a federal magistrate judge, who had authorized them to dispense with

the announcement requirement. In short, according to undisputed evidence, the officers had probable cause to believe that they were executing a warrant at a house containing a man convicted of two offenses involving firearms, who had vowed not to serve federal prison time, who had a proven history of violent escapes and a reputation for psychotic violence, and who had might have access to firearms in Ramirez's house.

Any reasonable officer would have feared for his safety under these circumstances. Thus, these officers acted reasonably in causing a minimal degree of property damage to secure Ramirez's home. Indeed, the Supreme Court in Wilson expressly found that forcible entry is justified in precisely this situation. The Court held that "it would be a 'senseless ceremony' to require an officer in pursuit of a recently escaped arrestee to make an announcement prior to breaking the door to retake him." 115 S. Ct. at 1919 (citation omitted). Thus, the officers in this case would have been justified in using far more force in entering Ramirez's dwelling. Instead, they confined themselves to breaking a single window in the part of the house thought to contain firearms. The intrusion on Ramirez's privacy and property interests was minimal and tailored to the officers' legitimate safety concerns.

The majority's conclusion that the police lacked sufficient grounds for breaking the window trivializes the danger the officers faced and second guesses a commonsense law enforcement judgment. The majority reasoned that "Shelby was not known to have ever shot or shot at anyone." A reasonable person does not need evidence

to force open a door when police knew the defendant was likely to be armed, had a violent criminal record, and associated with another violent criminal. Again, police had at least as much specific information that Shelby presented a threat of violence.

Similarly, in United States v. Ramirez, 770 F.2d 1458, 1461 (9th Cir. 1985), an FBI agent kicked down a door of a residence while executing an arrest warrant. This Court found sufficient exigent circumstances to justify this level of property destruction based on information that the defendants were suspects in a murder, were considered armed and dangerous, and knew that the FBI was looking for them. The Court did not require the kind of specific information that the defendants would use force to resist arrest that the Court believed was necessary in this case.

Thus, it is an understatement to state, as the majority does, that this Court's cases "graph a complex curve." In fact, the Court's cases can only leave law enforcement officials guessing concerning decisions that they must often make at the spur of the moment under highly dangerous and stressful circumstances.

The principal source of the confusion is the Court's rigid two-tier approach to the question whether exigent circumstances justify an unannounced entry. Under that test, a "mild exigency * * * can justify immediate entry when that can be done without any physical disruption of property," but "more specific inferences of exigency" are necessary to "justify physical destruction of property." See United States v. Becker, 23 F.3d at 1540. Here, for example, the majority concluded, "Perhaps [Shelby's] degree of

dangerousness bespoke a mild exigency. Certainly, it did not bespeak more."

This approach is unworkable. Police officers are not equipped to judge in the heat of executing a search warrant whether they confront a "mild exigency" or a not-so-mild one. Nor do officers know when they execute a warrant whether they will find an open door, which they can proceed through if they have a mild exigency, or a locked door that requires something more. Police officers should not have to compromise their safety because they encounter a locked door or window while conducting an otherwise valid search. Nor should the validity of a search depend on the fortuity of whether the officers find an opened or locked door. Indeed, the result in this case would have been different if the officers had found a garage window or door open at Ramirez's residence.

Moreover, the Court's two-tier approach unreasonably requires an increased showing of exigency whenever police officers cause property damage in executing a warrant. First, that requirement fails to recognize that in this day and age, the vast majority of people -- and certainly the vast majority of wrongdoers -- lock the doors and windows of their dwellings. Second, under the Court's approach police officers act equally unreasonably if, lacking "specific inferences of exigency," they breach a house's walls or, as in this case, they break the window of a room that may contain firearms. Instead of according dispositive significance to this factor, the extent of property damage should be considered as a single factor in the "reasonableness" balancing test required by

the Supreme Court's decision in Wilson. See Wilson, 115 S. Ct. at 1919; see also Bodine v. Warwick, 72 F.3d 393, 398 (3d Cir. 1995) (Wilson adopts an overall standard of reasonableness that considers exigency as a single factor). Put another way, either the police reasonably believe that the element of surprise is needed to avoid risk to their safety -- and may thus use appropriate force to effect an entry -- or they do not.[3]

3. The majority also erred in concluding that a violation of the announcement requirement requires suppression of the two fire-arms seized from Ramirez's house. As the Supreme Court has reiterated, "the issue of exclusion is separate from whether the Fourth Amendment has been violated, and exclusion is appropriate only if the remedial objectives of the rule are thought most efficaciously served." Arizona v. Evans, 115 S. Ct. 1185, 1192-93 (1995) (emphasis added) (citations omitted).

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[3] The Court's standard diverges from Wilson in another respect. The heightened standard of exigency necessary to justify property damage in executing a warrant appears to equal the showing of exigency necessary to make a warrantless entry into a home. To make an unannounced entry pursuant to a warrant, however, officers need not show the same level of "exigent circumstances" necessary to make a wholly warrantless entry into a dwelling. When officers rely on the "exigent circumstances" doctrine to enter a dwelling, they must show circumstances that justify dispensing with the requirement of a warrant altogether. See Payton v. New York, 445 U.S. 573, 585-86 (1980); Vale v. Louisiana, 399 U.S. 30, 34-35 (1970). By contrast, when officers have obtained a warrant, a neutral and detached magistrate has determined that probable cause exists to enter and search a dwelling. Thus, the magistrate has authorized the intrusion into the residence, and the question is only whether it would be "reasonable" within the meaning of the Fourth Amendment to dispense with the knock-and-announce requirement. It stands to reason that an unannounced entry pursuant to a warrant may be "reasonable" under circumstances that would not justify a wholly warrantless entry into a dwelling.

Suppression is not required in this case for three reasons. First, a magistrate judge had authorized the officers to dispense with the knock-and-announce requirement. Although the magistrate judge did not specifically authorize the officers to break Ramirez's window, the officers reasonably could have assumed that they were entitled to use an appropriate level of force to effect the unannounced entry. When, as here, police officers act in good faith reliance on the judgment of a neutral and detached magistrate, suppression will have no deterrent effect on police conduct. See United States v. Leon, 468 U.S. 897, 920-21 (1984) (when police obtain a warrant, "there is no police illegality to deter"). It is worth noting in this respect that even if the officers should not have broken the window, their overall conduct was reasonable: they announced their presence over a loudspeaker, they broke only the window in a garage thought to contain firearms, and they obtained a second warrant to seize the firearms.

Second, as this Court has held, "[d]eterrence can have its effect only when it can be said that an object of the illegal conduct was the securing of the evidence sought to be suppressed." United States v. Jones, 608 F.2d 386, 391 (9th Cir. 1979). Here, the object of the illegal conduct identified by the panel majority was securing Ramirez's garage to ensure that Shelby did not obtain access to weapons. Because the officers were not seeking evidence against Ramirez when they executed the warrant, there will be no deterrent effect, and the majority's contrary conclusion conflicts with Jones.

Third, the police learned of and seized Ramirez's firearms only because he discharged one of them when the police attempted to execute the search warrant. As Judge Kozinski, explained, "[b]ecause Ramirez's intervening act [of firing the gun] was not 'the intended result of illegal police conduct, * * * it attenuates the alleged taint from the no-knock entry." Slip op. 9479 (quoting United States v. Garcia, 516 F.2d 318, 319 (9th Cir.), cert. denied, 423 U.S. 934 (1975)).

4. Under any standard of exigency, the police officers acted reasonably in this case. The majority's contrary conclusion is not only erroneous, but it also rests on an overly rigid and unworkable standard of exigency. Rehearing en banc should be granted to correct the majority's error and to bring the Court's decisions into conformity with the Supreme Court's recent decision in Wilson.

CONCLUSION

For the foregoing reasons, rehearing en banc should be granted, the panel's decision should be vacated, and the district court's decision should be reversed.

Respectfully submitted,

KRISTINE OLSON
United States Attorney
District of Oregon

STEPHEN F. PEIFER
Assistant U.S. Attorney
District of Oregon

JOSEPH DOUGLAS WILSON
Attorney
Department of Justice

AO 93 (Rev. 5/85) Search Warrant

48

United States District Court

DISTRICT OF Oregon

Certified to be a true and correct copy of original.
Dated 11/7/94
Donald M. Sinnhong, Clerk
By J. Todd Deputy

In the Matter of the Search of
(Name, address or brief description of person or property to be searched)

A single Family Dweling located at:
23170 S.E. Bohna Park Road;
Boring, Oregon

SEARCH WARRANT

CASE NUMBER: 94m 630

TO: Wayne K. Kauffmann and any Authorized Officer of the United States

Affidavit(s) having been made before me by Wayne Kauffmann (Affiant) who has reason to believe that ☐ on the person of or ☒ on the premises known as (name, description and/or location)

23170 S.E. Bonha Park Road; Boring, Oregon, a light tan single family dwelling located on approximately ten (10) acres, with a large blue shed, a smaller green shed, and atleast two (2) travel trailers.

in the District of Oregon there is now concealed a certain person or property, namely (describe the person or property)

the person of Alan Lawrence Shelby, a white male; date of birth, 03/23/66; 160 lbs.,; 5'09" tall; brown hair; and blue eyes

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before November 13, 1994 (Date)

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search [redacted] (at any time in the day or night as I find reasonable cause has been established) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to ANY U.S. Magistrate Judge (U.S. Judge or Magistrate) as required by law.

Further because of exigent circumstances shown in the application, you are authorized to enter the premises without complying with the Knock-and-Announce requirement.

November 4, 1994 4:28 P.M. at Portland, Oregon
Date and Time Issued — City and State

Donald C. Ashmanskas, U.S. Magistrate Judge
Name and Title of Judicial Officer

Donald C. Ashmanskas
Signature of Judicial Officer

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Denver Post
Copyright 1996

Wednesday, April 3, 1996

Denver & The West

Drug-raid shooting victim wins $225,000 settlement

Denver Post Staff and Wire Reports

GREELEY - A man shot seven times by a police officer during a massive drug raid in the hamlet of East Eaton in 1993 has settled out of court with the city of Greeley for $225,000.

Juan Pablo Rocha-Gallegos, a local ranch hand, wasn't charged in connection with the drug raid, which did net 16 other arrests, or after he was accused of pointing a .357 Magnum at the Greeley officer, who then shot him as he leaped from his bed.

Rocha-Gallegos has maintained that he did not touch the gun that was lying on a nearby dresser when police executed a no-knock search warrant on the trailer home where he lived and burst in upon him before dawn on Nov. 12, 1993.

The city of Greeley agreed to the settlement despite two federal investigations into the shooting that showed no wrongdoing by the police and comments by the Weld County district attorney that the officer, Otto Hubbard, "would have been derelict" had he not shot the man. The district attorney concluded that the officer was "justified under the circumstances."

City Attorney Rick Brady said yesterday that the settlement was "like an insurance policy for the county because (the plaintiff) originally asked $1.2 million."

The agreement states that there is no admission of liability by the police in the shooting incident, and Brady said the settlement is important because his office - "although we have a good case" - wasn't certain it could win before a federal jury.

The drug **raid** was billed as the largest ever in Weld County. East Eaton was stormed by 170 National Guardsmen, **police** officers and sheriff's deputies. Armed with **no-knock** search warrants and assault weapons and backed by 20 Humvee all-terrain vehicles and drug-sniffing dogs, officers raided five East Eaton properties, about 10 miles north of Greeley, and two in north Greeley.

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(Publication page references are not available for this document.)

Law enforcement officials said the raid was the culmination of a lengthy investigation into drug-dealing activities among members of an extended family who had set up shop in the tiny community known as "Ragtown."

Although the Weld County Drug Task Force had obtained a no-knock search warrant for the trailer where Rocha-Gallegos lived, police had no warrant for his arrest.

They were seeking his brother, who was arrested that morning on drug charges.

Rocha-Gallegos has said he was awakened by the sound of the locks being shot off, then jumped out of bed when six people burst through the door shining flashlights on him.

Rocha-Gallegos spent 12 days in the hospital for bullet wounds in his chest, side, right arm and one leg.

The most significant sentences resulting from the investigation and the raid were for Francisco "Kiko" Gallegos, the alleged drug-gang ringleader, and Jesus Enrique Rocha-Gallegos, who were each sentenced to 14 years in prison, and a 12-year sentence and a $12,000 fine for Marcos Orlando Torres Monroy.

Gallegos, who owned an East Eaton bar, sold about 4 ounces of cocaine to an undercover agent, and Jesus Rocha-Gallegos was charged with selling cocaine and heroin to undercover agents on eight occasions.

Both pleaded guilty to several counts of selling drugs to undercover agents.

Monroy pleaded guilty to six counts of possession and distribution of controlled substances.

---- INDEX REFERENCES ----

KEY WORDS: LAWSUITS; SHOOTINGS; POLICE; DRUG RAIDS; AGREEMENTS; COLORADO

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Boston Herald
Copyright 1994

Sunday, March 27, 1994

NEWS

Boston Police 'sorry' for fatal mistake

Maggie Mulvihill and Joseph Mallia

A 75-year-old **minister** who police say was "as innocent as a newborn baby" died because a police SWAT team hit the wrong apartment, Police Commissioner Paul Evans acknowledged yesterday.

Evans apologized to the family of the Rev. Accelynne Williams, his neighborhood and the city. But an attorney hired by the family said the family "wants more than an apology."

"The one tragic fact that is clear at this time is that the Rev. **Accelyne Williams** was an innocent victim in the continuing war on drugs," Evans said.

The SWAT team - armed with a no-knock warrant - rammed into the Williams' Dorchester apartment and handcuffed the elderly man who later died from a heart attack.

A confidential informant told police that a heavily armed Jamaican drug gang was operating out of an apartment at 118 Whitfield St.

The informant told the police the drug den was in an apartment on the second floor, but the apartment he meant was actually on the building's third floor.

When the unannounced team - armed with shotguns and semi-automatic sidearms and wearing masks and helmets - battered down Williams' apartment door, he fled in horror to a bedroom, sources said.

Officers then battered down that door as well, where they found "a very frightened" Williams up against a wall with his fists up, sources said.

"It took two officers to subdue him. For an elderly guy, he was quite strong. He struggled the whole time," said one police source.

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(Publication page references are not available for this document.)

"They 'cuffed him with flexicuffs, and put him on the floor face down. But then he began to vomit, so they rolled him over on his side so he could breathe and called (an ambulance)," the source said.

Police then entered the apartment and conducted a fruitless search for drugs and weapons.

His widow, Mary Williams, clad in black and shaking, declined comment yesterday.

"I can't say anything," Williams said, as she secluded herself in a bedroom at a friend's home yesterday. "I can't talk to anybody now.

Evans said he met with Mary Williams yesterday morning for about 45 minutes.

"I extended the department's deepest sympathies to her and her family, and expressed our apology and regret for this tragic mistake," Evans said.

"In our conversation this morning, his wife pointed out the irony that her husband has dedicated his life to fighting drugs," he said.

At a press conference yesterday, Evans said he would not duck his first major crisis as commissioner.

"Six weeks ago, when I was sworn in as police commissioner, I stated that when we made a mistake we would admit it and accept responsibility for it," the commissioner said.

"In that spirit, I am apologizing not only to the Williams family, but the residents of the Mattapan community, and to the entire city for this tragedy," he said.

But John F. Drewry, an attorney hired by the family, said legal action against the city is possible.

"The family is going to be looking for much more than an apology," Drewry said.

The unusual layout of the building led to the tragedy, Deputy Superintendant Pervis Ryans Jr. said. Deputy Superintendant Edwar Eagar said it appeared that the officers followed correct procedures in entering the apartment.

Detectives conducted surveillance of the building to corroborate the informer's statements, but did not conduct

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(Publication page references are not available for this document.)
surveillance of the individual apartment, Ryans said.

And the informant was not brought inside the building to verify the correct apartment because that would have endangered the operation, he said.

Meanwhile, police yesterday said Drug Unit Det. Lisa Lehane - who prepared the affidavit for the search warrant and who pointed to Williams' door as being the correct apartment door before police burst in - said the confidential informant had provided reliable information at least twice in the past.

The affidavit stated that police expected to find an arsenal of weapons in the second-floor apartment, among them Uzis, semi-automatics, Glocks and MAC-10's, as well as cocaine and marijuana, police sources said.

"It seemed so needless and senseless," said the Rev. Rirchfield Aymer, Williams' close friend. "If only someone had stopped to check."

"Initially, I couldn't understand," Aymer said of the bungled raid. "Then I became angry, and I'm still angry about it."

Herald staffers Jason Johnson and Helen Kennedy contributed to this report.

---- INDEX REFERENCES ----

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The Evansville Courier
Copyright 1994

Monday, December 19, 1994

METRO

'No-knock' raid triggers anger Couple claim they were innocent victims

ROBERTA HEIMAN, Courier staff writer

Evansville police used tactics they had never used before in a predawn raid on an alleged "crack house" on Washington Avenue last week.

The tactics were justified, said police Sgt. Michael Lauderdale, in order to assure officers' safety. But some residents of the neighborhood said it was the most frightening thing they've ever experienced.

Sabrina Rucker contends she and her family were innocent victims caught between the police and alleged criminals in a "terrifying" episode.

Mrs. Rucker and her husband, Marcus, and daughter, Akiesha, 15, were asleep in their apartment at 131 Washington Ave., downstairs from the alleged crack house, when the police burst into their home at 3:50 a.m. Tuesday.

She said officers pointed a gun at her head and forced her to stand naked while they searched the apartment.

"It was horrible," she said. "I woke up and didn't know what was happening. It sounded like a war zone with loud bombs going off and blue lights flashing everywhere.

"All I could think of was my daughter (asleep in another bedroom) and I ran to find her.

"I bumped into a policeman and he had a gun pointed at my head. My husband said lie down, they're going to kill you.

"It was a nightmare," she sobbed. "A nightmare."

Three occupants of the upstairs apartment were arrested and charged with dealing in cocaine. Two are from Michigan, and police say had come to Evansville to establish a "crack house" in the apartment in November.

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(Publication page references are not available for this document.)

Mr. and Mrs. Rucker were jailed on preliminary charges of trafficking in cocaine, with bonds set at $25,000. But at a Tuesday morning court appearance the charges against the Ruckers were reduced to charges of possession of less than 30 grams of marijuana, a misdemeanor.

They were released after posting $150 bond.

Mrs. Rucker denies there were drugs in their apartment.

"There was no marijuana in our home," said Mrs. Rucker, 39.

She said she and her husband have no prior record of drug crimes.

They have lived in the Washington Avenue apartment for a year and have been "excellent tenants," said landlord Tom Offutt.

Offutt said he leased the upstairs apartment on Oct. 19 to a woman who told him she was a college student, and her boyfriend.

"She gave me references and I checked them out," he said.

The apartment is now a shambles, though the city plans to reimburse the landlord for the damage.

Officers broke out doors and windows, tore out the heat vents, tore insulation out of the attic, tore the beds apart and knocked the legs off the chairs and sofas.

There are holes in the walls from the explosive devices used by officers.

Lauderdale said those devices are called "flash bangs. They're a diversionary device. They explode, there's a flash and a boom, very loud."

"It was like 'The Twilight Zone,' " said Mary Smith of 129 Washington. "It was like a war. The SWAT team came running out of U-Haul trailers with guns. Police were everywhere. Bombs went 'boom, boom!' "

She said about five police officers banged on her door, came into her apartment and told her and her family to get in a back room.

"I'll never forget this as long as I live," she said. "The whole neighborhood is upset."

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St. Petersburg Times
Copyright 1994

Saturday, July 23, 1994

TAMPA BAY AND STATE

'We were just a family watching TV'

TIM ROCHE

Next to the window in his bedroom, Karnis Lewis settled into his favorite chair to watch a television movie.

In the living room, his stepson and grandchildren were ready to call it a night.

Robert Lee Peters sat on the floor, leaning against the couch where his 7-year-old autistic daughter was asleep. His 9-year-old son, BeBop, was lying on the floor.

They, too, were watching television, just as they did most nights since the children had come to spend the summer with their father.

"All of a sudden, all hell broke loose," said Lewis, 67. "There was banging on the door and I came out of my bedroom. I started asking what the hell was happening."

Peters had gone to the front door, holding out his arms to push his weight against it. Lewis asked him who was outside.

"I don't know," Peters replied. "Get your gun."

In the next few minutes, bullets would riddle the small house at 1011 Seventh St. N. The children would watch as their father was dying, and Lewis would have a mild heart attack.

As it turned out, it was Pinellas County sheriff's deputies at the door. A SWAT team had a warrant to search the house because Peters was suspected of selling marijuana.

Two weeks after the fatal July 7 shooting, however, State Attorney Bernie McCabe has cleared three tactical deputies who fired at Peters.

In a letter released Friday, McCabe said Peters "was committing the crime of attempted murder of a police officer" when he shot a .38-caliber pistol three times.

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(Publication page references are not available for this document.)

But Lewis said his stepson was not even armed when bullets began whizzing into the house. In fact, Lewis said, he was still unlocking a safe in his bedroom to fetch the .38 when shots rang out.

Here's his version of what happened:

Peters went to the bedroom, asking Lewis whether he'd gotten the gun yet. The banging had stopped by the time Lewis found the gun, so Peters walked back to the living room.

BeBop was shaking, and he followed his father into the living room. "Go back in there with your grandpa," Peters told the boy.

As the youngster crossed the living room, Lewis said, a bullet missed him by inches. "They fired right through the door and if BeBop hadn't moved, it would've hit him."

They heard rustling in the back yard.

Then Peters looked up. He saw a bullet hole in the mirrored tile above the couch where his daughter, Carmen, had been asleep. "It made him mad and he started shooting out the back door," Lewis said.

Suddenly, Peters grabbed his side. He'd been shot. He walked in front of the couch, then fell to his knees.

"Call 911," he said. "Damn, it hurts."

Lewis said he told the 911 dispatcher that somebody had been trying to break into the house and shot his son. In the confusion, he said, he forgot the address and had to ask Peters.

That's when he somehow disconnected the phone and he had to call 911 again. By then, the shooting had stopped.

BeBop tried opening the front door, but a piece of wood blocked it. So Lewis pushed open the door and walked outside. He heard somebody to his left say something about police.

'Yes, I need police," Lewis replied. "My son's been shot."

Lewis said he realized that the man was police. As Lewis walked farther into the yard, he noticed several other men. One of them told him to put his hands above his head, and Lewis shouted an obscenity at him.

Finally, he opened the door to his stepson's pickup and sat down. "I was taking my time because I had a hard time breathing," said Lewis, who has emphysema.

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(Publication page references are not available for this document.)

Inside the house, young Robert Peters Jr. was trying to get his father a drink of water. But the boy called BeBop couldn't get his father to grasp a plastic bottle.

Outside, somebody asked Lewis whether others were still in the house. Lewis told them about BeBop and Carmen. One man began yelling for BeBop, telling him to get his sister by the hand and leave the house.

Once the youngsters were outside, Peters crawled to the front door. "He was already shot and wounded and they drug him across the street."

That's where Peters remained as paramedics loaded his stepfather into an ambulance to take him to the VA Medical Center at Bay Pines.

Not until the next day did Lewis learn that his stepson had died. At first, Lewis would not talk to investigators. But he relented after several days, he said.

Whether he told them about Peters' fearing possible burglars and about the 911 calls could not be confirmed Friday because investigators did not release their case files.

But the state attorney's four-page letter said tactical deputies were serving search warrants the night of July 7.

First, deputies went to the apartment of Peters' brother, George, who also was suspected of dealing marijuana. After SWAT deputies barged into George Peters' apartment and detained him, they went to his brother's house about 10 blocks away.

About 9 p.m., SWAT deputies knocked on Robert Peters' door and announced "police" and "Sheriff's Office" and "search warrant," according to McCabe's letter.

All 14 members of the SWAT team and a paramedic heard the deputies announce their presence at the front door, the letter said. So did a neighbor who lived about 85 feet away.

But the television was "turned up very loud," and the windows were closed, and the air conditioner was "emitting considerable noise," the letter said. "It is possible that because of all this noise, Karnis Lewis and Robert Peters (Jr.) could not hear the deputies."

Because deputies could not get in the front door, they went to the back yard. Peters then fired two shots through the front door, the letter said. Deputy James Smith saw Peters in the window, gun in

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(Publication page references are not available for this document.)
hand, as the deputies took their place near the back door.

Smith fired through the window. "As SWAT members opened the rear doors to the residence," the letter said, "Peters fired in their direction."

Deputies Peter Eigo and Timothy Connolly shot back. Tests later showed Eigo had fired the fatal shot to Peters' right flank.

The three deputies have returned to work, but sheriff's spokeswoman Marianne Pasha said an internal affairs investigation should be completed next week.

Lewis insists that his stepson did not provoke a shootout. The family didn't hear police identify themselves until Lewis walked outside, he said.

"We weren't no terrorists. We weren't holding nobody hostage. We were just a family watching TV."

---- INDEX REFERENCES ----

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NEWS SUBJECT: LAW ENFORCEMENT (LEN)

STORY ORIGIN: ST. PETERSBURG

EDITION: CITY

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The **San Diego** Union-Tribune
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Sunday, December 13, 1992

LOCAL

Excesses blamed in 'bad' **raids**

PHILIP J. LaVELLE
Staff Writer

Three federal investigations into a drug raid that left an innocent Poway executive critically wounded in August will skirt the broader root causes of the errant raid, several knowledgeable federal sources warn. These sources say excesses in the war on drugs, including competition between agencies that are supposed to work together, contributed heavily to the shooting of Donald L. Carlson. And they say similar faults can be seen in other "bad" raids throughout the state and across the nation. Defense lawyers say flaws in the drug war threaten the civil rights of average citizens everywhere.

"The greatest damage drugs have done to our country is in the erosion of our civil rights," said Albert J. Krieger, a nationally recognized Miami defense lawyer whose clients include John Gotti, the "Dapper Don" of New York's Gambino crime family..

"We don't talk about (drugs) in terms of law-enforcement or in terms of education," Krieger said. "We talk about it in terms of war. If the president of the United States calls it a war, what is the typical police officer going to think? That he's on a mission. . . . And fundamental civil liberty has paid an enormous price in the war on drugs." Carlson, 41, was almost killed when heavily armed federal agents stormed his house on Silver Ridge Road at midnight Aug. 25. After almost two months in a hospital, he now calls himself a "spokesman for what is wrong with the war on drugs."

The raid on his home was planned by U.S. Customs Service agents acting on an informant's tip that 5,300 pounds of South American cocaine was being stored in Poway, guarded by men armed with automatic weapons. Customs was assisted by U.S. Drug Enforcement Administration (DEA) agents. The Customs and DEA agents were assigned to Operation Alliance, an anti-drug unit based at the border.

No drugs were found, and Carlson -- a Fortune 500 company executive roused from a deep sleep -- was wounded three times in the shooting that broke out after agents smashed into his house.

Since then, at least three secret federal investigations have sought to identify who is to blame for the ill-founded raid. But none is likely to examine the bureaucratic underpinnings of the drug war.

"The system caused this," said one senior federal source.

This source and others, all speaking on condition their names not be published for fear it could damage their careers, say the root causes of the errant raid on Carlson's house include:

[] Strong competition between some Customs agents and their counterparts in the DEA, a phenomenon that has intensified in the last three years since Customs was designated the principal drug-fighting agency at the border. "The Carlson shooting is an example of how competition between law-enforcement works to the detriment of the public," said one federal agent.

Added a San Diego jurist: "There's no question that when you have turf wars between law-enforcement agencies, you're going to have potential for disaster."

[] Heavy pressure from Customs managers -- who stand to gain professionally by generating arrests and big caseloads -- on street agents to produce headline-grabbing cases.

[] A pervasive emphasis among federal drug-fighting agencies on generating statistics showing big drug seizures to demonstrate to policy-makers and budget officials in Washington, D.C., that their efforts in the war on drugs are on the right track, thereby guaranteeing continued funding. [] An overreliance on informants.

San Diego County has seen several cases in the past year in which police raided the homes of innocent people only to find that they had the wrong house. Most of these **raids** were based on bad tips from informants. In July, an informant's bum tip led **San Diego** police to storm a Logan Heights home. The residents say their daughters were subjected to genital searches while a gun was held to the head of their 6-year-old son. No drugs were found. Police later apologized.

A year ago, a Riverside County task force raided a house in Vista, forcing everyone inside, including a 67-year-old grandmother, to lie face down on the floor at gunpoint. Again, no drugs.

And in April, an elderly La Mesa couple was shocked to see city police smash through their locked wrought-iron gate and then burst through their front door with a battering ram. Police began to search the house, then realized the suspected drug house they were to **raid** was a block away. Like **San Diego** police, they apologized.

It's also happened elsewhere around the state.

On Oct. 2, members of a Los Angeles County-federal drug task force shot and killed 61-year-old reclusive millionaire Donald P. Scott at his Malibu-area ranch. They thought they'd find more than 40 marijuana plants on the property. They found none.

Farther north, in late November, police in Stanislaus County acting on an informant's bad tip broke into a home and held a retired couple on the floor at gunpoint for 45 minutes before realizing their mistake. Later, a sheriff's official admitted they were "180-degrees wrong." The Carlson shooting led to a federal grand jury probe into the circumstances of the raid, keying on statements the informant made to agents. Meanwhile, Customs and the DEA are conducting their own separate internal investigations into their agents' actions.

U.S. Attorney William Braniff said those investigations should conclude in a month.

Sources caution that competition between federal law enforcement agencies is nothing new. But the intensity of the rivalry between some Customs and DEA agents working along the border is, sources say.

It came about after January 1990, when President Bush proposed a $10.6 billion plan designating five regions -- including the Southwest border stretching from California to Texas -- as high-intensity drug-trafficking areas eligible for millions of additional federal dollars. This new initiative brought the major shift in national drug strategy, giving Customs the leading role in the drug war at the border, a responsibility that had previously been the exclusive domain of the DEA. This, in turn, sparked intensified rivalry between some Customs and DEA agents, sources said, and manifested itself in the planning stages of the Poway raids. "It's very competitive now," one law-enforcement source said. Sources have said the informant in the Poway case, identified only as Ron, had been kicked out of the Operation Alliance offices by his DEA handlers about two weeks before the Carlson shooting. He was informally dismissed because DEA agents doubted his truthfulness, sources said. Customs and DEA officials have denied these reports.

Sources said despite his reported fall from grace, Ron was recruited by Customs agents at Alliance and used as the centerpiece of a major cocaine investigation.

How could this happen?

"Real simple," said one veteran lawman. "(It was) we'll show you (the DEA). . . . We'll go out and make a 5,000-pound cocaine case and show you." Another source said this stems from an attitude, fostered by supervisors at Customs, that Customs agents are the intelligentsia of federal drug enforcement.

Consequently, this source explained, "when a DEA agent says, 'This guy's no good,' the first thing a Customs agent wants to do is prove DEA wrong." Jack C. Kelley Jr., agent in charge of the Customs office here, declined to respond to these criticisms, saying he couldn't do so because the federal investigations are not complete.

Senior federal officials privately say such allegations of flaws in the drug war are overly broad and are being fed to the media by a small minority of agents.

But several law-enforcement sources critical of the Poway raid speculated that pressure from Customs managers on agents to make arrests and produce big cases probably inspired the raid. The motive was to go for a high-profile seizure, but this occurred at the expense of some basic police work, such as corroborating the informant's claims. This pressure is generated by a desire by managers to keep statistics high, several knowledgeable sources said. Impressive seizures allow these managers of the drug wars to ask for, and receive, larger staffs -- and higher pay.

Police sources say errant **raids** are a fact of life in drug work. Said one **San Diego** police veteran: "Every narc, at one time or another, has hit a wrong door."

---- INDEX REFERENCES ----

KEY WORDS: ARRESTS; ATTEMPT; BORDERS; CRIME; DRUGS; IDENTIFICATION; KILLINGS; MEXICO; POLICE; PROBES; SAN DIEGO; USA;

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The San Francisco Chronicle
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Monday, November 2, 1992

NEWS

Fatal Shooting by Police Questioned In Drug Raid / Critics say they have too much power

Associated Press

The death of a multimillionaire recluse shot by law officers during a failed raid on his **Malibu-area** ranch has raised questions about police tactics in the war on drugs.

The killing of former Hollywood socialite **Donald Scott** marked the second time in recent weeks that drug agents in Southern California have shot a person in a raid that yielded no evidence of drugs.

In the Scott case, an attorney contends that police hoped to seize the ranch under federal forfeiture laws that allow property to be confiscated before a defendant is convicted.

A similar raid in which San Diego County businessman Donald Lee Carlson was gravely wounded prompted an investigation by the U.S. attorney into whether federal agents acted improperly.

QUESTIONS ABOUT LATITUDE

These shootings and other questionable raids around the country have caused concern among legal scholars about the latitude given police in the war on drugs.

"I hear more and more reports of this sort of thing happening," said Paul Rothstein, a Georgetown University law professor and past chairman of the American Bar Association's criminal procedures committee.

"Particularly the seizure of property aspect has been a major problem. It raises huge amounts of revenue for the government, so there's an incentive to do it," he said.

Scott, heir to a European chemicals fortune, was killed October 2 as members of a drug task force led by Los Angeles County sheriff's deputies burst into his rambling home in the hills above **Malibu.**

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(Publication page references are not available for this document.)

Roused by his wife's cries and partially blinded by a recent cataract operation, the 61-year-old Scott rushed into the living room holding a .38-caliber revolver above his head.

Deputies said that instead of dropping the weapon as ordered, Scott lowered it in the officers' direction. He was shot twice in the chest.

HE HAD REFUSED TO SELL

Attorney Nick Gutsue, a longtime friend and executor of Scott's estate, contends that lawmen were looking for a reason to seize the 200-acre ranch. Scott had refused to sell his property to the federal government as part of an expansion of the adjacent Santa Monica Mountains National Recreation Area.

"This was not about drug seizure -- this was about asset seizures. They went up there to seize property," he said.

Captain Larry Waldie, who heads the Sheriff's Department narcotics bureau, strongly denied the allegation.

"To me that's an incredible statement or innuendo to suggest something like that," he said.

A week before the shooting, an air surveillance expert flew over the ranch and reported seeing about 50 marijuana plants growing in pots, Waldie said.

Drug agents' suspicions also were aroused by an informant's tip that Scott's wife of three months, Frances Plante, 38, was seen in **Malibu** flashing $100-dollar bills.

"We do believe dope was growing there," said Waldie.

Agents arrived at the ranch about 8:30 a.m., knocked and identified themselves to Plante, who failed to open the door, Waldie said. After several minutes, officers forced the door and burst inside.

The officers' contention that the gun was pointed at them is supported by the angle of a bullet that passed through Scott's bicep before entering his chest, Waldie said.

Also, the primer on the bullet that was chambered to fire appeared to have been dented by a firing pin, suggesting that Scott pulled the trigger but the gun failed to fire, Waldie said.

The gun and bullet are being examined as part of an investigation

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(Publication page references are not available for this document.)
to determine whether the officers should face criminal charges.

The idea of Scott growing marijuana is ludicrous to Gutsue, who said Scott was fanatically anti-drug and even drove along back trails looking for marijuana that might have been planted without his knowledge.

Scott's independent wealth and lifestyle alone could have easily attracted the attention of drug agents. His inheritance made a regular job unnecessary, and Plante said in interviews just after the shooting that she regularly drew money from Scott's Swiss bank account and spent lavishly.

IRS GARNISHMENT

Furthermore, Scott had not filed an income tax return since 1987, Gutsue said, and the Internal Revenue Service garnished $3,000 per month from one of his bank accounts. "It was just sheer laziness on his part," said the attorney.

In the Carlson case, DEA and U.S. Customs Service agents were acting on an informant's tip that there were large amounts of cocaine in Carlson's suburban San Diego home.

Both agencies have declined to discuss the raid, citing the U.S. attorney's investigation.

John Coughlin, Carlson's attorney, said, however, that agents made no attempt to check out the information before crashing through the door around midnight August 26.

Paul Hoffman, legal director of the American Civil Liberties Union of Southern California, said both cases demonstrate that police have been given too much latitude in fighting the drug trade.

"I think the general concern is that the war on drugs and crime has been waged like a war . . . there are a wide variety of abuses that have occurred," he said.

Rothstein agreed, noting the belief has been underscored by the U.S. Supreme Court's decision to review several cases involving property seizures from people who were never charged with a crime.

---- INDEX REFERENCES ----

KEY WORDS: BIOGRAPHY; SHERIFF; MISTAKES; CA; POLICE CONDUCT; DRUGS; CRIME; PROTEST; MURDER;

STORY ORIGIN: LOS ANGELES

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Thursday, November 14, 1991

LOCAL NEWS

ANATOMY OF A SHOOTING 8-year-old dies after gun battle during drug raid Officer thinks he may have killed boy

Kathy **Scruggs** STAFF WRITER

A narcotics detective fired four times into an 8-year-old boy's bedroom window because he thought a gunman who had already shot one officer was about to leap through it, a police official said Wednesday night.

But the suspect went out another window, and one of the detective's bullets may have killed Xavier Antone Bennett Jr., lying in his bed a few feet from the window.

Xavier died from a 9mm bullet wound in the left side of his neck.

"The detective thought about it, and after putting it all together in his mind, he felt like it could have been him," said the official, who asked not to be named.

"He's hoping and praying he's not, because he's going to have to live with that. In a way, you can call him a victim as well.

"It's one of those tragic things that happens," the official added. "People don't know what it feels like to be scared to death when somebody's got a gun and firing at you."

Atlanta police are conducting an internal investigation to determine whether it was a police bullet or a shot fired by his stepfather, Bobby Bowman, that killed Xavier.

Mr. Bowman was charged with murder as well as drug violations and aggravated assault. "The unfortunate death of this child is the direct result of the felonious acts of Mr. Bowman," said Police Chief Eldrin Bell.

The gunfire erupted at 2:15 a.m. Wednesday when nine morning-watch officers, both uniformed patrolmen and narcotics detectives, served a search warrant on Apartment 1093 at 2332 Walton Lane in the East Lake Meadows Housing Project. They were looking for drugs after Mr. Bowman, 29, allegedly made three crack

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cocaine sales to them. It was not clear why they did not arrest Mr. Bowman during one of the purchases.

Police said they knocked and identified themselves before ramming through the door.

Kathy Smith Bowman said she and her husband were asleep in the rear of the four-room apartment and did not hear police knock.

"We thought we were fixing to be robbed," she said. Her husband "grabbed the shotgun because it was beside the bed. He started shooting."

She said she crouched on the floor and heard her husband say, "I've been hit," before he leaped out the bedroom window. When the shooting stopped, she said, she ran to Xavier's bedroom and found him on the bed in a pool of blood. He gasped, "Mommy," before he died, she said.

Chief Bell said Mr. Bowman opened fire with a shotgun blast that missed several officers before striking Sgt. Wayne Snyder in the lower abdomen and a finger. Officers said the undercover detective was wearing a bulletproof vest, but the shot caught the edge of the garment and penetrated his abdomen. He was in satisfactory condition Wednesday night at Crawford Long Hospital.

Mr. Bowman was injured attempting to escape from a rear window. He was shot in the forearm, hand, knee and foot. He was in guarded condition at Grady Memorial Hospital.

"They hit the place and the guy came out firing with a shotgun and 9- millimeter pistol," said a police official who asked not to be named. "Everybody's ducking for cover and everybody's returning fire. Somebody yelled the guy was jumping out the window. He did jump out the rear window. A detective and couple of police officers were at the front of the apartment, and when somebody yelled he was coming out the window, the detective started firing at the window."

The official said the detective was "visibly upset."

"He never did say he was the one who hit the child," the official said. "The shade was drawn on the window, and I think in the heat of the moment he assumed it was that window. He had already heard shots. He knew the guy had a gun."

Mrs. Bowman said her husband had a 9mm pistol, but she didn't think he fired it during the melee.

Another official said it will take a ballistics analysis to determine if the bullet came from a police weapon or Mr. Bowman's

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pistol.

The officers confiscated 32 hits of crack cocaine and $2,500 in cash, including marked money police had used in the drug purchases, Chief Bell said.

A neighbor, Noland White, criticized police for bursting into the apartment.

"There would have been a better way to arrest a man," he said. "If somebody crashed through my door in the middle of the night, I'm going to start shooting. They're coming in here to hurt me or take something."

Lt. C.B. Jackson of the Special Investigations Section refused to discuss the Bowman case in particular but said ramming a door is a fairly common tactic with drug search warrants.

The ram is used to "facilitate a rapid entry because the person inside will almost automatically destroy any drugs," Lieutenant Jackson said. "If you wait for him to open the door . . . chances are the contraband has been flushed."

The shooting is the third in less than a week involving Atlanta children. Shortly after midnight Saturday, 11-year-old Jeremiah Anderson, who had been watching a dice game in Summerhill, was gunned down by two teens in ski masks. The suspects remain at large.

On Sunday night, Michael Taylor, a 19-year-old Atlanta man, was shot to death after flirting with a carful of girls in northwest Atlanta. Four boys - ages 11 to 14 - have been charged in his slaying.

Staff writers Bill Montgomery and Susan Laccetti contributed to this article.

---- INDEX REFERENCES ----

KEY WORDS: POLICE; WEAPONS; DRUGS; INVESTIGATIONS; DEATHS; CHILDREN; INVESTIGATIONS

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The San Francisco Chronicle
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Wednesday, December 2, 1992

NEWS

Apologies 'Don't Help' For Cops' Drug Raid Error

Associated Press

William Hauselmann wants more than an apology after armed, masked police acting on a phony tip raided his home in search of a clandestine drug lab.

"All that pushing and pulling, and all they can do is apologize," Hauselmann said. "I think that's just rotten. Their apologies don't help a bit."

The 64-year-old retired ranch foreman said Monday that he was considering legal action.

He said he suffered a bruised back and facial cuts when he was pinned to the floor Saturday by drug agents who burst into his home, breaking down a door, in a search for a methamphetamine lab.

He said that his blood pressure has "gone straight to hell" since the raid and that his wife, Marian, 61, has had nightmares. They said they were handcuffed and held at gunpoint for 45 minutes.

"Those people are a bunch of gangsters. They're animals," he said. "You're supposed to have faith in the police, but they just lost mine. I don't have any use for them."

"I remember seeing those little beady eyes coming out from behind the ski masks," he said. "It's one of those things you see on television, but I never thought it would happen to me."

Officers obtained a warrant to search the Hauselmanns' home based on a Thanksgiving Day tip from someone who claimed he was being pressured to join a drug ring, said Stanislaus County sheriff's Sergeant Bill Welch.

"Our information was 180 degrees wrong," Welch said.

"I sympathize with the family," said Sheriff Les Weidman.

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(Publication page references are not available for this document.)

"Obviously we thought there were armed drug dealers in there."

Hauselmann wants to know why no one checked with neighbors who could have assured authorities that he and his wife were not dealing drugs.

He said he and his wife eventually will "try to slough it off" but said he doubts they will ever forget.

In October in Southern California, millionaire rancher **Donald Scott** was fatally shot during a mistaken drug raid on his **Malibu** home.

---- INDEX REFERENCES ----

KEY WORDS: POLICE CONDUCT; CA; MISTAKES; DRUGS; CRIME; POLICE; SEARCH & SEIZURE;

STORY ORIGIN: OAKDALE, STANISLAUS COUNTY

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Tuesday, July 31, 1990

METRO

N.H. JUDGE BLASTS POLICE SEARCH, THROWS OUT EVIDENCE IN DRUG CASE

Associated Press

NEW HAMPSHIRE

MANCHESTER, N.H. - A Hillsborough County Superior Court judge criticized Hudson police for flagrantly violating the state's "knock and announce" rule during a drug raid and ordered the evidence that was seized thrown out.

"The actions of the Hudson police in this case, which is apparently representative of their general procedure in executing all search warrants for narcotics, underscores the importance of the enforcement of the knock and announce rule," Judge William Groff wrote.

"The potential for unnecessary violence and injury to police and citizens by virtue of the indiscriminate use of such tactics is staggering."

Groff ruled in a case stemming from an April 1989 raid. In another drug raid four months later, **Hudson** police shot and **killed** Bruce **Lavoie** in his home as his wife and children watched. His widow; Susan **Lavoie**, has filed a $25 million lawsuit against the town and Police Department.

The suit, in federal court in Concord, alleges that the circumstances did not warrant police raiding the home without knocking. In court papers, the town and police acknowledge that police did not knock before entering the apartment, but claim police did announce who they were once they were inside.

In the April 1989 raid, Groff ruled last week in favor of defense requests to suppress evidence. Groff said he reached his decision after viewing a videotape.

"It is doubtful that the court would have appreciated the extreme violence attendant to the execution of the warrant by mere verbal description," Groff wrote.

He said marijuana and other items seized during the April 1989 raid could not be used to prosecute Christopher Roystan, 21, of Hudson. Groff said execution of the search warrant violated Roystan's constitutional right against unreasonable search and seizure.

Groff also threw out Roystan's confession to police that the marijuana was his.

Roystan is charged with felony possession of marijuana with intent to sell.

The "knock and announce" rule requires police to knock on a suspect's door and identify themselves before entering unless doing so would jeopardize police officers' safety or allow suspects to destroy evidence.

The rule is intended to protect people's privacy and to prevent violence that could result from unannounced entry.

Roystan's lawyer, Cathy Green, also represents Lavoie. Green declined to comment yesterday because the civil suit is pending in the Lavoie case.

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---- INDEX REFERENCES ----

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The Saturday Oklahoman
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Saturday, December 21, 1991

NEWS

Federal Agents Raid Wrong **Guthrie** Home Resident Tells of **Forced** Entry, Claims

Abuse

Ed Godfrey

A Guthrie man says he feels "raped and violated" after agents of the U.S. Drug Enforcement Administration raided his home by mistake Thursday night.

Jerry Jones says DEA agents used an ax to break down the front door of his home and that he was handcuffed, shoved against a wall and kicked by agents before they realized they were at the wrong house.

"I didn't know what the hell was going on," Jones said. "I have no recall of names and faces. I just remember guns and blackjacks."

Jones, his wife and two daughters live at 3301 S Pine. Federal agents Thursday night were trying to execute a search warrant at 3307 S Pine, said Don Webb, resident agent in charge of the DEA office in Oklahoma City.

Webb said Friday he was still trying to learn what happened.

"If we made an error in the reading of the number, we will be the first to admit it," Webb said.

Jones said he, his wife Denise, and their 8-year-old daughter were in a bedroom listening to Christmas music on the stereo when they heard yelling and banging on the door.

Before Jones reached the door, agents had knocked it down and "I had two pistols in my face," he said.

Jones said he was not shown any badges or a search warrant by the agents. The men were wearing DEA jackets, he said. Jones claimed that while he was handcuffed one agent kicked him hard in the tailbone to get him to lie face down on the floor.

One of the agents then asked his wife about the address, Jones said. When she told him it was 3301 S Pine, the agent told the others they were at the wrong house, he said.

"Everyone went outside and just left," Jones said. "There were no apologies."

Jones, an industrial electrician, said he suffered abrasions on his back from the incident.

Webb said Jones' allegations are being investigated. He said he understood that the door was "forcibly entered" but called the alleged abuse by agents on Jones "extremely uncharacteristic" of raid teams.

"I have strong reservations about whether he was abused," Webb said.

Once agents were satisfied they were at the wrong house, "they did apologize and explain what was going on," Webb said.

"If you go out there and look at the mailboxes and the (numeral) addresses on them, you can see where the error might have occurred," Webb said.

The raid resulted from three drug arrests the DEA made Thursday morning in Chickasha, Webb said. Two of the men arrested, Benny Mack Golden, 33, and Mitch Allen Derenia, 39, live at 3307 S Pine in Guthrie, he said.

Golden and Derenia were charged in Oklahoma City federal court Friday with possessing 278.3 grams of methamphetamine with intent to distribute.

Golden was carrying a loaded .45-caliber semiautomatic handgun when he was arrested, records show. Agents were looking for other possible suspects and drugs at 3307 S Pine, Webb said. They are unsure where that home is located, he said.

Jones has retained Oklahoma City attorney Mike Gassaway and said he wants his door repaired as soon as possible. Webb said the DEA would pay for the door, "if (Jones) will allow us to do it."

"If he wants to litigate it, we will have to litigate it," Webb said.

Jones says he is amazed that law enforcement didn't first determine whether or not they had the correct address before breaking into his home. Whether he files a lawsuit or not "depends on what my attorney says," he said.

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Sunday, December 13, 1992

PART-A; Metro Desk

Man Shot in Botched Drug Raid Files Claim
Associated Press

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The Boston Globe
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Sunday, October 8, 1989

NEW HAMPSHIRE WEEK

DEADLY FORCE POLICEMAN'S FATAL SHOT WILL HAUNT HIM FOREVER OFFICER IN LAVOIE CASE FACES PROBES, TRAUMA

Bob Hohler, Globe Staff

NEW HAMPSHIRE WEEKLY

HUDSON - After everything -- the fight, the fatal gunshot and the frenzy that followed -- it was the memory of finding **Bruce Lavoie's** 8-year-old son in the dark that shook Hudson Police Sgt. Stephen J. Burke to tears.

Burke had burst into the boy's bedroom in a predawn drug raid, a police shield in one hand, a semiautomatic pistol in the other. The boy's father, sleeping in the room to comfort his son after a nightmare, had leaped up and tried to subdue Burke. The two had wrestled, Burke's gun had fired and Lavoie, a 34-year-old machinist who, authorities say, had less than two marijuana cigarettes in the apartment, had fallen to the floor.

"Are you hit?" Burke asked, according to a 350-page report on the fatal shooting by the New Hampshire attorney general's office.

Lavoie, moaning and asking for his wife, Susan, in the next room, indicated that he had been hit in the chest. At that, Burke called for an ambulance. And as Lavoie writhed on the floor, Burke sat on a mattress next to him, urging Lavoie to lay still.

Only then did Burke see Lavoie's son sitting on the bed. The boy had seen the struggle. He had heard the shouts and the gunshot. Now, as day began to break, he was watching his father die.

When Burke tried to recount the scene later for investigators, he faltered.

"At this time, Sgt. Burke became very emotional and began to cry," State Police Sgt. Michael Miles wrote in a report to Assistant Attorney General Andrew Serall. "He expressed concern for both his family and the family of the victim for what they would have to go through because of this incident."

Burke, a respected officer who often served as the

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(Publication page references are not available for this document.)

department's prosecutor in court, had cried earlier when he was driven from Lavoie's apartment to the Hudson police station. And like the at least 40 other officers involved in deadly force cases since 1974, he is likely to continue to suffer. His torment will include nightmares, name callers and recurring questions about his role in the shooting, said both a police psychologist and a New Hampshire police officer involved in an unrelated shooting.

"It's a tough thing to get over," said Lt. John E. Clark, a law enforcement specialist for the New Hampshire Police Standards and Training Council. Clark was a Concord police sergeant in 1985 when he fatally wounded Louis Cartier, a 16-year-old dropout from Concord High School who had taken two hostages at the school, then fired on Clark and another officer with a double-barreled shotgun.

"I feel for Sgt. Burke," Clark said. "I hope he weathers the storm."

Burke, who is 31 years old and married with no children, was placed on administrative leave soon after Lavoie died, leaving a wife and three young sons. Later, when the attorney general's report faulted Burke for "a serious breach of police protocol and training" in the raid, he was suspended for 10 days without pay.

Now, two months after the shooting, Burke apparently is unable to return to work. He has asked Hudson Police Chief Albert Brackett to keep him on indefinite sick leave and has applied for permanent disability status, a source said.

Burke could not be reached for comment last week, and Brackett would say only that Burke remains on sick leave, citing confidentiality laws regarding personnel records.

But no one expects Burke's recovery to come easily. After the shooting, he endured a probe in which the attorney general considered -- and rejected -- charging him with negligent homicide. The FBI investigated him. And the shooting prompted calls by the attorney general, state legislators, defense lawyers and the state chapter of the American Civil Liberties Union for improved police training and drug investigations.

In addition, Susan Lavoie filed a $25 million federal lawsuit against Burke and three other Hudson police officers. Hundreds of townspeople protested the shooting, among them a woman at a public hearing who called Burke "a bumbling idiot" and a man who wore a sandwich board that read, "Don't shoot, I have a family, too."

The Hudson police also received threats on Burke's life.

The sad irony, said Leo Shea, a police psychologist, is that

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(Publication page references are not available for this document.)
police officers involved in deadly force cases often are their own harshest judges. Shea, who consults for about 60 New Hampshire police departments, Hudson among them, would speak only in general terms about the issue, citing confidentiality laws. He said he has counseled more than 40 police officers involved in deadly force cases since 1974.

"I have not known one police officer who is not keenly aware of the commandment, 'Thou shalt not kill,' " Shea said. "Police officers generally are conservative. They believe it's their duty to preserve the peace, and it has an enormous impact on them when they take a life. They never forget it. In many cases, they end up the victim."

For Clark, whose decision to use deadly force was deemed justifiable by the attorney general, the aftermath may have been less troubling than Burke's has been.

Clark, a 12-year veteran, was platoon leader on Dec. 3, 1985, when Cartier, a shotgun in hand and ammunition belt around his waist, took two hostages in a high school stairwell. One hostage bargained for his freedom by offering Cartier a getaway ride. The other stood next to Cartier as armed police took positions around them.

The standoff itensified for 15 minutes. Then a teacher, Donald LeBrun, asked to trade places with the hostage. Cartier responded by aiming his shotgun at LeBrun. The teacher dove to the floor, and a Concord patrolman, Michael Russell, fired one round from his service revolver, striking Cartier in the ammunition belt.

"Why did you hit me?" Cartier said, shooting back and missing.

Then, as the hostage fled, Clark fired two rounds from his 12-gauge shotgun, hitting Cartier in the wrist and the head. The head wound was fatal.

Four years later, Clark remembers the months before the shooting as the best of his career. He had gained local celebrity as the Concord police department's public relations specialist and as head of security for Christa McAuliffe, the Concord social studies teacher who was selected to ride in space and later died on the Challenger shuttle explosion.

Clark had told McAuliffe's students how proud he was that he had never fired his weapon in the line of duty.

Then came the shooting. Afterward, people called him "baby killer," he said. He suffered nightmares, waking at night to the imaginary sound of gunfire. He replayed the episode countless times

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(Publication page references are not available for this document.)
in his mind. And he said he confronted "the vulnerability of a community and its citizens, whether they be you, me or Louis Cartier."

But Clark said he would do nothing differently if the same situation arose today.

"As cold as this may sound, I was called upon to do my job," he said. "I feel very badly for Louis Cartier. I feel sad for him. But, unfortunately, we had to take one life to save many others. To this day, I have no remorse about that."

Both Shea and Clark said much of the public fails to understand the complexity of a police officer's job.

"You hear people asking, 'Why didn't the officer just shoot the gun out of the suspect's hand?' " Shea said. "Well, this isn't television. It's real life."

Another segment of the public expects too much of police officers, Shea said.

"Most police officers don't want to be heroes," he said. "They also don't want to be scapegoats. And they certainly don't want to be martyrs."

Clark urged officers involved in deadly force cases to learn from the episodes and go forward. But that may be difficult for Burke, who is likely to face years of litigation, lingering memories and reminders of the effects of Lavoie's death on his family.

"Very obviously, **Bruce Lavoie's** wife and children are terribly traumatized," said Cathy Green, the family's lawyer. "This is something they are going to carry with them forever."

Burke has had no contact with the Lavoies since the shooting, Green said. But if history holds true, Burke, too, will carry the scars of **Bruce Lavoie's** death for a lifetime.

HOHLER;10/03 NKELLY;10/06,09:57 NHCOPS08

---- INDEX REFERENCES ----

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Citation | Rank(R) | Database | Mode
3/13/92 HARPEN B3 | R 2 OF 3 | ALLNEWSPLUS | Page
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1992 WL 8738942
(Publication page references are not available for this document.)
The Harrisburg Patriot
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Friday, March 13, 1992

STATE/LOCAL

Lawsuit seeks $100,000 in damages

Bill Savitsky Jr.
For The Patriot-News

WEST HAZLETON The survivors of a man killed by a state agent during a drug raid last month have filed a federal lawsuit calling the shooting death unjustified, and seeking more than $100,000 in damages from law-enforcement officials involved in the raid.

The lawsuit alleges that members of the state Attorney General's Southern Luzerne County Drug Task Force entered the home of 34-year-old **John Fellin** on Feb. 28 without a valid search warrant, and without knocking or identifying themselves as police, and shot Fellin without provocation.

Copies of the search warrants used by police show they expired 18 hours before the search.

Family members have said there was no struggle or any resistance offered by Fellin, and they have called the shooting "cold-blooded murder."

Police said Fellin, of 205 Winters Ave., was trying to wrestle a shotgun away from state narcotics agent James Kolojejchick when the suspected marijuana dealer was shot five times in the chest and pelvis by state drug agent Keith Charles.

A subsequent search found about one pound of marijuana in Fellin's home, and about four more pounds of marijuana in a former barroom at 21-23 Cranberry Ave., owned by Fellin's father, Leo, police said.

The Attorney General's office has completed its investigation into the shooting, but is waiting to announce its findings until Luzerne County District Attorney Peter Olszewski's separate investigation is complete, said Robert Gentzel, spokesman for the Attorney General's office.

Olszewski has said preliminary findings in his investigation show the shooting was "100 percent justified."

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(Publication page references are not available for this document.)
"The fact is . . . it was a justifiable shooting in self defense, after he attacked the police," Gentzel said.

The lawsuit was filed Wednesday in U.S. Court for the Middle District of Pennsylvania in Scranton by Fellin's estranged wife, Karen, and his father.

The suit asks for more than $50,000 in compensatory damages, more than $50,000 in punitive damages, plus costs and expenses.

Defendants named in the suit include Charles, Kolojejchick and fellow state drug agent William Gowden; Hazleton police Detective Edward Harry; West Hazleton Lt. Thomas Wallace and Officer William Harris; Freeland Officer David Bogansky; and Butler Twp. Police Chief David Remenar.

State Attorney General Ernie Preate Jr. also is listed as a defendant, although an attorney for Fellin's family said his inclusion is part of an "umbrella pleading" taken in case the lawsuit eventually is expanded to include Preate's office.

Attorney Michael Lynn of Bloomsburg called the initial filing a starting point for what likely will be numerous legal actions stemming from Fellin's death.

"This is a way to initiate action, to get in federal court and use the court's powers . . . to pursue this and other potential actions," Lynn said.

A related motion to have the court immediately seize all evidence related to the raid was denied by Judge Edwin Kosik.

---- INDEX REFERENCES ----

KEY WORDS: COURT

STORY ORIGIN: WEST HAZLETON

EDITION: FIRST

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No. 96-1469

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

HERNAN RAMIREZ,

Respondent.

DOCUMENTS A-G

LODGED IN SUPPORT OF RESPONDENT'S BRIEF

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE AND MAILING

I, Michael R. Levine, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.2, service has been made of the within DOCUMENTS A-G LODGED IN SUPPORT OF RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the counsel for the petitioner by depositing in the United States Post Office, in

Portland, Oregon on May 16, 1997, first class postage prepaid, a certified true, exact and full copy thereof addressed to:

Walter Dellinger
Acting Solicitor General
Department of Justice, #5614
10th & Constitution, N.W.
Washington, D.C. 20530

Further, the original and ten copies were mailed to the Honorable William K. Suter, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on May 16, 1997, with first-class postage prepaid.

DATED this 16th day of May, 1997.

Michael R. Levine
Attorney for Respondent